87-188

Supreme Court, U.S.
FILED
JUL 31 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RANDOM HOUSE, INC. and IAN HAMILTON,

Petitioners,

v.

JEROME D. SALINGER, a/k/a J.D. SALINGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT M. CALLAGY
MARK A. FOWLER
SATTERLEE & STEPHENS
230 Park Avenue
New York, New York 10169
(212) 818-9200

FLOYD ABRAMS
Counsel of Record
DEVEREUX CHATILLON
CAHILL GORDON & REINDEL
(a partnership including
professional corporations)
80 Pine Street
New York, New York 10005
(212) 701-3000

Attorneys for Petitioners

Questions Presented

1. Is the decision of the Court of Appeals for the Second Circuit that the Copyright Act bars virtually any quotation at all from or any fair use of technically unpublished letters of the prominent subject of a biography, even when those letters have previously been publicly disseminated, consistent with this Court's ruling in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), the Copyright Act and the First Amendment to the United States Constitution?

2. Did the Court of Appeals correctly resolve the question left open by this Court in *Harper & Row* as to what constitutes the taking of "expression" as opposed to use of ideas or facts under the Copyright Act?

3. Is it consistent with the Copyright Clause of and the First Amendment to the United States Constitution for a prior restraint to be entered against publication of a scholarly biography because it contains brief quotations and paraphrases from technically unpublished but publicly disseminated letters?

Parties to the Proceeding

The parties before this Court are those set forth in the caption.[1]

[1] Pursuant to Supreme Court Rule 28.1, we advise the Court that Random House, Inc. is a wholly owned subsidiary of Newark Morning Ledger Co., which is in turn wholly owned by Advance Publications, Inc., which is privately owned by a testamentary trust under the will of S.I. Newhouse and by members of his family. None of Random House's affiliates or subsidiaries are publicly owned.

TABLE OF CONTENTS

	Page
Table of Authorities	v
Opinions Below	1
Jurisdiction	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	4
The District Court Opinion	6
The Opinion of the Court of Appeals	8
REASONS FOR GRANTING THE WRIT	9
I. The Court of Appeals' Prohibition on the Fair Use of Technically Unpublished Letters is a Serious Distortion of Copyright Law That Threatens Historical Scholarship and is Inconsistent With the First Amendment	10
II. The Court of Appeals' Overly Expansive Definition of Expression Impermissibly Included the Report of Facts and Ideas	16
III. Copyright Law and the First Amendment do not Permit Enjoining a Scholarly Biography to Prevent Brief Quotation from Letters	19
CONCLUSION	25

Page

APPENDIX

Opinion of the United States Court of Appeals for the Second Circuit, January 29, 1987 (reversing District Court and remanding with instructions to enter preliminary injunction) A-1

Decision of the United States District Court for the Southern District of New York, November 5, 1986 (denying preliminary injunction) A-21

Opinion of the United States Court of Appeals for the Second Circuit, May 4, 1987 (denying rehearing) A-46

Order of the United States District Court for the Southern District of New York, February 18, 1987 (entering preliminary injunction) A-49

TABLE OF AUTHORITIES

Cases	Page
Apple Barrel Productions, Inc. v. Beard, 730 F.2d 384 (5th Cir. 1984)	23
Belushi v. Woodward, 598 F. Supp. 36 (D.D.C. 1984)	23
Blazon, Inc. v. DeLuxe Game Corp., 268 F. Supp. 416 (S.D.N.Y. 1965)	23
Consumers Union of United States, Inc. v. Hobart Manufacturing Co., 189 F. Supp. 275 (S.D.N.Y. 1960)	23
Estate of Hemingway v. Random House, Inc., 49 Misc. 2d 726, 268 N.Y.S.2d 531 (Sup. Ct. N.Y. Co.), *aff'd*, 25 A.D.2d 719, 269 N.Y.S.2d 366 (1st Dep't 1966)	21, 22n-23n
Estate of Hemingway v. Random House, Inc., 53 Misc. 2d 462, 279 N.Y.S.2d 51 (Sup. Ct. N.Y. Co.), *aff'd*, 29 A.D.2d 633, 285 N.Y.S.2d 568 (1st Dep't 1967), *aff'd*, 23 N.Y.2d 341, 296 N.Y.S.2d 771, 244 N.E.2d 250 (1968)	12
Harper & Row, Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985)	*passim*
Harper & Row, Publishers, Inc. v. Nation Enterprises, 723 F.2d 195 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985)	18
Hoehling v. Universal City Studios, Inc., 618 F.2d 972 (2d Cir.), *cert. denied*, 449 U.S. 841 (1980)	18, 22

Page

Landsberg v. Scrabble Crossword Game Players, Inc., 736 F.2d 485 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984) 18

Maxtone-Graham v. Burtchaell, 803 F.2d 1253 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 2201 (1987) 22

Meeropol v. Nizer, 361 F. Supp. 1063 (S.D.N.Y. 1973) 21

Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) 20

New York Times Co. v. United States, 403 U.S. 713 (1971) 20

Nutt v. National Institute Inc. for the Improvement of Memory, 31 F.2d 236 (2d Cir. 1929) 9

Rosemont Enterprises, Inc. v. Random House, Inc., 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967) 18, 21-22, 23n

Constitutional Provisions

U.S. Const. Art. I, § 8, Cl. 8 ..... 2, 19-20

U.S. Const. Amend. I 2, 9, 16n, 19-24

Journals and Law Reviews

Benedict, *Historians and the Continuing Controversy Over Fair Use of Unpublished Manuscript Materials*, 91 Am. Historical Rev. 859 (Oct. 1986) 11, 16n, 24

Page

Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 Cal. L. Rev. 283 (1979) 21

Francione, *Facing the Nation: Standards for Copyright, Infringement, and Fair Use of Factual Works*, 134 U. Pa. L. Rev. 519 (1986) . 16n

Note, *When "Fair is Foul": A Narrow Reading of the Fair Use Doctrine in Harper & Row, Publishers, Inc. v. Nation Enterprises*, 72 Cornell L. Rev. 218 (1986) 16n

Newspapers and Magazines

Didion, *Finally (Fashionably) Spurious*, National Review, Nov. 18, 1961, p. 341 ..... 4n

Hoban, *The Salinger File*, New York Magazine, June 15, 1987, p. 37. ..... 4n, 15

Mitgang, *516 Pirandello Letters Donated to Princeton*, New York Times, Dec. 29, 1986, p. C13, col. 1 11

Mizenen, Harpers, February 1959 ..... 4n

Newsweek, May 30, 1960 ..... 4n

Romano, *Salinger Was Playing Our Song*, New York Times Book Review, June 3, 1979, p. 11, col. 1 ..... 4n

Sullivan, *Einstein Letters Tell of Anguished Love Affair*, New York Times, May 3, 1987, p. 1, col. 3 11

Page

Statutes

Copyright Revision Act of 1976

17 U.S.C. § 102(b) (1982) 3, 13, 17
17 U.S.C. § 107 (1982) 3, 10-16
17 U.S.C. § 303 (1982) 13

Judicial Code

28 U.S.C. § 1254(1) (1982) 2
28 U.S.C. § 1292(a) (1982) 2
28 U.S.C. § 1331 (1982) 2
28 U.S.C. § 1338 (1982) 2

Books and Treatises

J. Barzun & H. Graff, *The Modern Researcher* (1962) 11, 11n, 20n

J. Garraty, *The Nature of Biography* (1957) 10n, 19n-20n

I. Howe, *Celebrations and Attacks: Thirty Years of Literary and Cultural Commentary* (1979) .. 4n

H.J. Lang, *Letters in American History* (1982) ... 10

1 M. Nimmer, *Nimmer on Copyright* (1986) 12, 13

3 M. Nimmer, *Nimmer on Copyright* (1986) 16n

No. 87-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

RANDOM HOUSE, INC. and IAN HAMILTON,

Petitioners,

v.

JEROME D. SALINGER, a/k/a J.D. SALINGER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Random House, Inc. and Ian Hamilton respectfully pray that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Second Circuit entered in this action on January 29, 1987.

Opinions Below

There have been three opinions below in this matter, one by the District Court and two by the Court of Appeals. In chronological order they are:

1. *Salinger v. Random House, Inc. and Ian Hamilton*, 650 F. Supp. 413 (S.D.N.Y. 1986) (Leval, J.) (denying a preliminary injunction) (a copy is in the Appendix to this Petition at A21).

2. *Salinger v. Random House, Inc. and Ian Hamilton*, 811 F.2d 90 (2d Cir. 1987) (Newman, J.) (reversing and remanding with instructions to enter a preliminary injunction) (a copy is in the Appendix at A1).

3. *Salinger v. Random House, Inc. and Ian Hamilton*, 818 F.2d 252 (2d Cir. 1987) (*per curiam*) (denying defendants' petition for a rehearing) (a copy is in the Appendix at A46).

Jurisdiction

This is an action for alleged copyright infringement over which the District Court had jurisdiction under 28 U.S.C. §§ 1331, 1338 (1982). The Court of Appeals had jurisdiction to hear the appeal from the denial of a request for preliminary injunction under 28 U.S.C. § 1292(a) (1982). The opinion and order of the Court of Appeals was entered on January 29, 1987. A timely petition for rehearing with a suggestion of rehearing *en banc* was denied on May 4, 1987, and this petition for a writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

Constitutional and Statutory Provisions Involved

Article I, section 8, clause 8 of the United States Constitution provides that:

> "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

The First Amendment to the United States Constitution provides that:

> "Congress shall make no law . . . abridging the freedom of speech, or of the press."

Section 102(b) of the Copyright Revision Act of 1976, 17 U.S.C. § 102(b) (1982) (hereinafter the "1976 Copyright Act") provides:

> "In no case does copyright protection . . . extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated or embodied in such work."

Section 107 of the 1976 Copyright Act, 17 U.S.C. § 107 (1982), provides that:

> "Notwithstanding the provisions of section 106, the fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> "(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> "(2) the nature of the copyrighted work;
>
> "(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> "(4) the effect of the use upon the potential market for or value of the copyrighted work."

Statement of the Case

In 1983, petitioner Ian Hamilton, a highly respected literary critic for *The London Sunday Times* who had previously written an award-winning biography of the poet Robert Lowell, agreed with Random House to write a biography of J.D. Salinger, the celebrated author of *The Catcher in the Rye*, *Franny and Zooey*, and other fiction. (C.A. App. Vol. I at 95-96, 106)[2] Mr. Salinger opposed publication of any biography about him during his lifetime. (C.A. App. Vol. I at 104) Extraordinarily reclusive in his personal life, his writings have made him an American author of undiminished significance and imperishable interest to the public.[3]

Faced with Mr. Salinger's unwillingness to be interviewed or otherwise to cooperate in the preparation of the biography, Mr. Hamilton looked to other sources in order to prepare the biography. (C.A. App. Vol. I at 97-98) In addition to interviewing people who knew Mr. Salinger, reviewing previously published

---

[2] Citations to the Appendix to the Petition will be in the form App. A __; citations to the Joint Appendix before the Court of Appeals will be in the form C.A. App. Vol. ____ at ____.

[3] *E.g.*, "Salinger is probably the most avidly read author of any serious pretensions in his generation." Mizener, Harpers, February, 1959. "Although Salinger pursues privacy with the same passion that some men pursue pleasure, his name bobs up oftener in current literary conversations than that of any American writer — including Hemingway." Newsweek, May 30, 1960. "Among the reasonably literate young and young in heart, he is surely the most read and reread writer in America today, exerting a power over his readers which is in some ways extra-literary." Didion, *Finally (Fashionably) Spurious*, National Review, Nov. 18, 1961, p. 341. "Among contemporary novelists Saul Bellow commands literary influence, Norman Mailer an intellectual following and James Baldwin an intense audience. Only J.D. Salinger can be described as the priest of an underground cult." I. Howe, *Celebrations and Attacks: Thirty Years of Literary and Cultural Commentary* p. 93 (1979). "Salinger is one of the very best living writers [not] merely a good one. Salinger is a victim not of neglect but of our careless, unrecast affection." Romano, *Salinger Was Playing Our Song*, New York Times Book Review, June 3, 1979, p. 11, col. 1. "Salinger may be the most widely read, least prolific author ever." Hoban, *The Salinger File*, New York Magazine, June 15, 1987, p. 38.

biographical accounts, and studying Mr. Salinger's published writings, Mr. Hamilton located letters to and from Mr. Salinger that had been deposited for the use of scholars and the general public in university libraries across the country. (C.A. App. Vol. I at 98) Thirty-six of the letters also had been quoted at length in a bibliography published in 1984. *See* J. Sublette, *J.D. Salinger: An Annotated Bibliography* (1984) (C.A. App. Vol. I at 110-11; Vol. II at 827-38).[4] Mr. Hamilton made use of these letters in writing his biography of Mr. Salinger. (C.A. App. Vol. I at 98) The book was prepared by Mr. Hamilton over a three year period and was scheduled to be published in the fall of 1986 in the United States by Random House and in Great Britain by a different publisher. (C.A. App. Vol. I at 98-100)

When Mr. Salinger obtained a copy of the galleys of the biography in May, 1986, his lawyers contacted Random House and raised questions about the propriety of the book quoting from letters written by him. (C.A. App. Vol. I at 99-107) Mr. Salinger then registered the letters with the Copyright Office. (C.A. App. Vol. I at 9, 108) In response to Mr. Salinger's expressed concern, Mr. Hamilton worked closely with a Random House editor to eliminate almost all quotations, and to ensure that while the facts revealed in the letters were reflected in the biography, the expression was Mr. Hamilton's, not Mr. Salinger's. (C.A. App. Vol. I at 99, 108-09) In this final draft of the biography,[5] quotations from the letters total approximately 200 to 300 words drawn from 79 different letters — an average of less than 3.8 words per letter. (App. A23)

Still dissatisfied with the prospect that an unauthorized biography would be published, and desirous, as he testified, of protecting his personal privacy (C.A. App. Vol. II at 953), Mr. Salinger sought a preliminary injunction. After entering a temporary restraining order, the District Court denied the request

---

[4] Excerpts from some of the letters were also published in *Story* Magazine, *The Philadelphia Sunday Bulletin Magazine* and elsewhere. (C.A. App. Vol. I at 236-37, 244, 247-48)

[5] Random House and Mr. Hamilton stipulated that they would not distribute the earlier draft of the biography. (App. A24) The only draft at issue below was the later draft.

for a preliminary injunction. (App. A45) That denial was reversed on an expedited appeal by the Court of Appeals for the Second Circuit. (App. A20) On February 18, 1987, the District Court entered a preliminary injunction. (App. A49-50) After rehearing by the Court of Appeals was denied (App. A48), this petition was filed.

The District Court Opinion

The District Court first turned to the threshold issue of the nature of the material quoted or paraphrased and determined that the "vast majority" of Mr. Salinger's copyrighted material used by Mr. Hamilton was not copyright protected in the first place. (App. A25) "Salinger's letters," the District Court concluded,

> "are full of information about his life upon which the biographer has drawn. Such information is not protected by the copyright. Unprotected information of this nature includes far more than the where, when and with whom. Information as to the subject's thoughts and feelings is vital historical fact for the biographer and belongs in the unprotected categories, so long as the biographer does not overstep permissible limits by taking the author's craftsmanship." (App. A25)

The District Court recognized that "the author's own original image, choice of words, and turn of phrase are protected and there will be infringement (absent justification) when they are appropriated whether by direct quotation or by paraphrase." (App. A27) Having found that some passages of the biography went "beyond the permissible report of a historical fact or an idea and . . . reproduced an image, literary device, metaphor or choice of words that is protected by copyright," the District Court turned to the question of fair use. (App. A29)

The District Court determined that only a few words from approximately thirty of the letters were at issue. After considering each of the fair use factors, the District Court held that

> "Salinger has demonstrated no likelihood of success. To the contrary, I believe the defendants have so far shown their likelihood of success that it is doubtful whether plaintiff prevails on the first factor of the second branch — a showing of fair grounds for litigation. I need not resolve that issue, however, because plaintiff has shown neither irreparable harm nor the balance of hardships tipping decidedly in his direction.
>
> "Hamilton's appropriations of copyrighted expressions are too minimal to subject Salinger to any serious harm. There is no substantial revelation of the copyright protected aspects of his letters. There is no adverse impact on their market value as literature by Salinger.
>
> "The adverse impact on defendants from a preliminary injunction, on the other hand, would be substantial. . . . The book is in print awaiting distribution. The lengthy delays that might result from waiting for appeals and for final trial on the merits might seriously impair the marketability of the book. First publication licenses optioned to *The New York Times Sunday Magazine* would be imperiled. The balance of hardships favors the defendants." (App. A44-45) (Citation omitted)

The District Court discussed the narrower scope of fair use in unpublished works announced by this Court in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) ("*Harper & Row*"). Concluding that the minimal use of Mr. Salinger's expression did not "impair Salinger's control over first publication of his copyrighted letters or interfere with his exercise of control over his artistic reputation," and based on the court's evaluation of the four fair use factors, the court determined that no injunction should issue. (App. A35, 45)

The court also expressed concern that Mr. Salinger was misusing the injunctive remedies provided by copyright to prevent publication of *any* biography about him:

> "Hamilton's use of copyrighted expression is so minimal, it is difficult to perceive any harm to Salinger. The wound he has suffered is not from infringement of his copyright but from the publication of a biography that trespasses on his wish for privacy. The copyright law does not give protection against that form of injury." (App. A42)

The Opinion of the Court of Appeals

In evaluating the four fair use factors that had been found by the District Court to favor Random House and Mr. Hamilton, the Court of Appeals decided that all but the first, the nature of the allegedly infringing work, weighed on Mr. Salinger's side of the question. Key to the Court of Appeals' decision directing entry of a preliminary injunction against publication of the biography was its holding that this Court's decision in *Harper & Row* established that unpublished works "normally enjoy complete protection against copying any protected expression." (App. A13) The Court of Appeals gave this "special emphasis" in evaluating the claim of fair use. (App. A10)

The Court of Appeals devoted a significant portion of its opinion to criticizing what it perceived as the failure of the District Court to include instances of impermissibly close paraphrase in its analysis of the "amount and substantiality of the portion used," the third fair use factor. (App. A13-14) In fact, the District Court had previously addressed this paraphrase issue and had counted close paraphrase of Mr. Salinger as if it had been quotation.[6] (App. A24)

---

[6] The District Court did this by use of an exhibit prepared at the court's request by Mr. Salinger's attorneys. The court annotated the exhibit to identify all direct quotations in red, all impermissibly close paraphrase in yellow, all noncopyrightable material in orange, and all reports of facts and ideas that did not include expression in green and blue. This color coded exhibit demonstrated that the District Court had considered each of those few instances of impermissibly close paraphrase in assessing the "amount and substantiality of the portion used." (App. A47-48)

Petitioners' motion to modify the record on appeal to include the District Court's color coded exhibit (n.6, *supra*) was granted. (App. A48) Nevertheless the petition for rehearing and suggestion of rehearing *en banc* was denied. (App. A48) Although the Court of Appeals acknowledged that the exhibit established that the District Court had "meticulously" analyzed the contested passages with the idea/expression dichotomy in mind (App. A47), the Court of Appeals declined to reconsider its decision. Citing only *Nutt v. National Institute Inc. for the Improvement of Memory*, 31 F.2d 236, 237 (2d Cir. 1929), for the proposition that an author has a protectible interest in the arrangement of his composition (App. A48), the Court of Appeals did not attempt to explain whether – and to what extent – it disagreed with the District Court's findings about what did and did not constitute impermissibly close paraphrase. Once again, the Court of Appeals made no reference to the fact that virtually all of the Salinger letters had been publicly disseminated and, in some cases, previously published. And, as in its initial opinion, the court did not even consider the possibility that the imposition of a prior restraint on publication, combined with the near absolute prohibition on fair use of technically unpublished material, placed nearly every unauthorized biography or history in legal jeopardy.

REASONS FOR GRANTING THE WRIT

At the heart of this case are issues of recurring and transcendent importance relating to the nature of fair use in the Copyright Act and the interrelationship of that Act to the First Amendment. Since October 3, 1986, a prior restraint has been in effect barring the publication of a biography of J.D. Salinger. Based upon the Court of Appeals' view that there may be virtually no quotation from or fair use of letters written by Mr. Salinger, the public has been deprived of the opportunity to read what the trial court referred to as "a serious, carefully researched biography of an important literary figure," a work of "social and educational value." (App. A35, 40) Whether viewed simply as a matter of statutory interpretation of the scope of fair use under the Copyright Act, or as a question of the interplay of that Act with First Amendment principles, this case raises serious issues well worthy of this Court's plenary review.

I.

The Court of Appeals' Prohibition on the Fair Use of Technically Unpublished Letters is a Serious Distortion of Copyright Law that Threatens Historical Scholarship and is Inconsistent With the First Amendment

Letters are the stuff out of which biographical history is made. As one historian has written:

> "Letters furnish the raw material for the writing of history and sometimes even influence the course of events. Yet unlike written history, letters breathe with vitality and realism. They give a sense of living presence — a feeling almost of being a participant."

H.J. Lang, *Letters in American History* 11 (1982).[7]

---

[7] This sentiment has been echoed by another student of biography who has observed that: "Most valuable are the subject's own writings for, of course, no one else can know as much about him as he himself knew." J. Garraty, *The Nature of Biography* 177 (1957). Commenting on the revealing nature of letters, Garraty wrote:

> "All men, however, write letters, and remarkably large numbers of these are preserved. Here again, the material varies tremendously from person to person. What a difference between Theodore Roosevelt's impetuous volubility and Calvin Coolidge's restrained taciturnity! A few days after the assassination of McKinley had elevated Roosevelt to the Presidency, he wrote his close friend Henry Cabot Lodge: 'I must just send you a line . . . for naturally you have been in my thoughts almost every hour of the last fortnight. It is a dreadful thing to come into the Presidency this way; but it would be a far worse thing to be morbid about it. Here is the task, and I have got to do it to the best of my ability.' When Harding's sudden death elevated Coolidge to the Presidency, 'Silent Cal' wrote one of his friends: 'Dear George — I know you are thinking of me. I am all right.' But in every case, a man's letters tell a great deal about his life — either directly or indirectly." *Id.* at 178 (ellipses in original).

The decision of the Court of Appeals imperils the writing of all biography – most particularly the writing of literary biographies. By their nature, those works are histories of the thoughts and ideas of writers, works on the process of imagination of writers. Such works would often be nearly pointless, not to say superficial, if biographers were not permitted to make some fair, if modest, reference to the full range of published and unpublished writings that illuminate the creative process.[5]

The District Court opinion concluded that especially because Hamilton had written "the biography of a powerful writer . . . [t]he history is more lively and true to the extent that it uses Salinger's own sharp images in preference to a neutered description of his thoughts or feelings." (App. A36) "[I]t certainly tells more," Judge Leval observed, "about Salinger to read his acid quip that anyone who has worked for 'a good upholsterer' considers himself qualified to edit a short story anthology . . . than to be told that he resented the presumption of unqualified editors." (App. A36)

The Court of Appeals' opinion disagreed in substance and in spirit with the decision of the District Court. In doing so, it placed biographers and historians in a double bind. On the one hand, their craft requires them to pursue primary sources, such as unpublished letters, because such documents provide unique insights into the experiences, attitudes, and emotions of their subject. *See, e.g.*, Mitgang, *516 Pirandello Letters Donated to Princeton*, New York Times, Dec. 29, 1986, p. C13, col. 1 (reporting on the historical importance of certain unpublished letters and quoting therefrom); Sullivan, *Einstein Letters Tell of Anguished Love Affair*, New York Times, May 3, 1987, p. 1, col. 3 (same); Benedict, *Historians and the Continuing Controversy Over Fair Use of Unpublished Manuscript Materials*, 91 Am. Historical Rev. 859, 870 (Oct. 1986); J. Barzun & H. Graff, *supra*, at 131-33. It is the

---

[5] Letters are an especially important source because they provide contemporaneous and "unpremeditated" evidence of historical events. J. Barzun & H. Graff, *The Modern Researcher* 131-33 (1962).

biographer's duty to gather information from sources as yet untouched; otherwise he is relegated to merely rewriting what has already been written.

On the other hand, the Second Circuit's opinion tells biographers that if, like Ian Hamilton, they discover through their own diligence materials that have not been published generally, they are *not* at liberty to quote or convey any of the richness of those materials without facing the risk – perhaps the likelihood – of an injunction. Unlike the District Court, the Court of Appeals had little or no sympathy for the biographer faced with this dilemma:

> "[T]he biographer who copies the letter writer's expression of facts properly faces an unpleasant choice. If he copies more than minimal amounts of (unpublished) expressive content, he deserves to be enjoined; if he 'distorts' the expressive content, he deserves to be criticized for 'sacrificing accuracy and vividness.' " (App. A11)

Prior to the opinion below, the courts had given far broader scope to the doctrine of fair use when considering unpublished letters of historical significance. *See* 1 M. Nimmer, *Nimmer on Copyright* § 5.04, at 5-34 & n.15 (1986). For example, in *Estate of Hemingway v. Random House, Inc.*, 53 Misc. 2d 462, 468, 279 N.Y.S.2d 51, 58 (Sup. Ct. N.Y. Co.), *aff'd*, 29 A.D.2d 633, 285 N.Y.S.2d 568 (1st Dep't 1967), *aff'd*, 23 N.Y.2d 341, 296 N.Y.S.2d 771, 244 N.E.2d 250 (1968), the court noted that:

> "in the case of a prominent figure in the arts, the subject matter of his letters was a legitimate source of biographical material. This is especially so where the letters shed light on his thoughts, opinions, and methods of creativity."

The ruling by the Court of Appeals did not distinguish or even mention the *Hemingway* case – the one precedent most nearly on point. Nor is the opinion limited to letters or unpublished

material of contemporary authors, politicians, or the like. Common law copyright, which applied to all unpublished works before passage of the 1976 Act, was perpetual. All works not published before January 1, 1978 are now, under the new statute, covered by statutory copyright until at least the year 2002. *See* 1 *Nimmer on Copyright* § 5.04, at 5-34; 17 U.S.C. § 303 (1982). Thus even for letters written in the distant past, statutory copyright protection exists. To allow the heirs of William Faulkner, Henry James, Thomas Jefferson, or even Cotton Mather to enjoin in 1987 any use of unpublished material authored by these men stretches copyright protection beyond all reasonable bounds.

The Court of Appeals reached this extreme and unprecedented conclusion by divining from *Harper & Row* a nearly absolute prohibition against any quotation at all from unpublished material. But the Court of Appeals failed to recognize that while in *Harper & Row* this Court found the unpublished nature of a work to be a "key, though not necessarily determinative, factor" in the fair use analysis, 471 U.S. at 554, this Court by no means established an absolute rule against quotation from technically unpublished works. The Court of Appeals ignored the fact that in *Harper & Row* this Court expressly stated that "dissemination of a work may tip the balance of equities in favor of prepublication use." 471 U.S. at 551. In fact, this Court expressly said in *Harper & Row* that the "right not to speak" does not sanction "abuse of the copyright owner's monopoly as an instrument to suppress facts." *Id.* at 559. Yet that is exactly what has occurred here.

At issue in *Harper & Row* was whether The Nation magazine's news article about, and quoting some 300 to 400 words from, former President Ford's then unpublished autobiographical manuscript violated Ford's copyright unless excused under the fair use doctrine. In the course of its ruling, this Court rejected Harper & Row's argument that there could be no fair use of unpublished works. To the contrary, this Court held that "the right of first publication, like the other rights enumerated in § 106, is expressly made subject to the fair use provision of § 107." 471 U.S. at 552.

A crucial aspect of the *Harper & Row* decision was former President Ford's interest in creative control over his unpublished manuscript. The Court said that

> "[t]he period encompassing the work's initiation, its preparation, and its grooming for public dissemination is a crucial one for any literary endeavor . . . . The obvious benefit to author and public alike of assuring authors the leisure to develop their ideas free from fear of expropriation outweighs any short-term 'news value' to be gained from premature publication of the author's expression." *Id.* at 555.

Because they are finished products, letters, of course, do not even implicate this concern. When they are sent to the recipient, the author has finished the creative process and relinquished physical control.

Another repeated theme in the Court's discussion of the unpublished nature of the manuscript at issue in *Harper & Row* was the commercial value of the right of first publication, a right that the Court found had been interfered with by The Nation's news article that quoted from and preceded the book's publication and that the Court found had supplanted planned serialization in *Time* magazine. None of that is at issue here. At his deposition, Mr. Salinger testified that the letters were of no financial value to him, that he had no plans to publish them, and that he might consider destroying any letters in his possession. (C.A. App. Vol. II at 925, 928-29, 941, 953) Indeed, Salinger's literary agent testified that she had thrown nearly 500 similar letters into the wastebasket. (C.A. App. Vol. I at 273-75) Moreover, the District Court found that due to the *de minimis* nature of the copyrighted expression quoted or paraphrased, the market value of plaintiff's literary property would not be affected in any way. (App. A45) Even the Court of Appeals found that the effect on the market for the copyrighted work — traditionally the most important fair use factor — weighed only "slightly" in Mr. Salinger's favor and agreed with the District Court that "the book would not displace the market for the letters." (App. A18) Thus,

the concern expressed by this Court in *Harper & Row* about the economic effect if conduct such as The Nation's was repeated is not present here.

To the Court of Appeals, "unpublished" meant "unquotable." Thus the Court of Appeals vitiated a critical holding of this Court in *Harper & Row*: that "the right of first publication, like the other rights enumerated in § 106 is expressly made subject to the fair use provision of § 107." 471 U.S at 553.

What the Court of Appeals wholly failed to recognize is the use of copyright in this case to suppress speech. It is not disputed by Mr. Salinger that the letters at issue here are the best – often the sole – source of much important information about his life, his ideas, his opinions, his philosophies and his emotions. (C.A. App. Vol. 1 at 274-75; Vol. II at 931-33) Nor has Mr. Salinger (or the Court of Appeals) taken issue with Judge Leval's conclusion that the Hamilton study is "a serious, carefully researched biography of an important literary figure (of whom little is known)." (App. A35) Indeed, it is plain that Mr. Salinger has used the Copyright Act – so far, successfully – to assure that as little becomes known of him as is possible.

It should thus come as no surprise that the Organization of American Historians stated in a brief *amicus curiae* filed with the Court of Appeals in support of the petition for rehearing that if the opinion below is allowed to stand, "it would severely limit the historical use of archival manuscript material." Or that it more generally has been recognized that "if this precedent-setting case is finally decided in favor of Salinger, the elusive author's influence on future biography, journalism and nonfiction could prove as indelible as his mark on modern fiction." Hoban, *supra*, at 37.[9]

Only review by this Court can avoid that indelible impact resulting from the decision of the Court of Appeals.

---

[9] Prior to this case, a number of commentators had warned that a blanket restriction on the quotation of unpublished materials would be inconsistent with the

(Footnote continued on next page)

II.

The Court of Appeals' Overly Expansive Definition of Expression Impermissibly Included the Report of Facts and Ideas

In *Harper & Row*, this Court described "the controversy between the lower courts in this case over copyrightability" as "a dispute over whether The Nation's appropriation of unoriginal and uncopyrightable elements encroached on the originality embodied in the work as a whole." 471 U.S. at 548. Although the Court recognized that "[e]specially in the realm of factual narrative, the law is currently unsettled regarding the ways in which uncopyrightable elements combine with the author's original contributions to form protected expression," the Court declined to reach the issue. *Id.* This case presents an opportunity to address this recurring yet unresolved issue.

The District Court and the Court of Appeals in this case disagreed sharply over the extent of paraphrasing of Mr. Salinger's letters in the Hamilton biography and its legal significance. Both courts, however, agreed that paraphrasing that closely tracked Salinger's copyrighted expression was either infringement or fair use.

The District Court concluded that the "vast majority" of the allegedly infringing material was not protected by copyright because what was used was information about Mr. Salinger's life contained in his letters:

> "Unprotected information of this nature includes far more than the where, when and with whom. Information as to the subject's thoughts and feelings is vital

---

Copyright Act and the First Amendment. *See, e.g.*, Francione, *Facing the Nation: Standards for Copyright, Infringement, and Fair Use of Factual Works*, 134 U. Pa. L. Rev. 519, 544 n.137 (1986); Note, *When "Fair is Foul": A Narrow Reading of The Fair Use Doctrine in Harper & Row, Publishers, Inc. v. Nation Enterprises*, 72 Cornell L. Rev. 218, 235, 240-41 (1986); 3 M. Nimmer, *Nimmer on Copyright* § 13.05, at 13-75 n.218 (1986). *See also* Benedict, *supra*, at 870 (effect of strictly limiting fair use of unpublished materials housed in libraries would be "devastating" for "future scholars of recent history").

> historical fact for the biographer and belongs in the unprotected categories, so long as the biographer does not overstep permissible limits by taking the author's craftsmanship." (App. A25)[10]

The Court of Appeals disagreed. It included as one example of impermissible paraphrase Hamilton's treatment of Salinger's observation in a letter that "I suspect that money is a far greater distraction for the artist than hunger." Hamilton entirely rewrote this to attribute to Salinger the view that "Money, on the other hand, is a serious obstacle to creativity." (App. A18 n.5) The structure, sound and phrasing of the Salinger and Hamilton sentences are entirely different. If the Court of Appeals believed this to be one of the most striking examples of close paraphrase, the conclusion is inescapable that the Court of Appeals was protecting ideas, not expression, under the guise of copyright.[11] The Court of Appeals' opinion thus contravenes section 102(b) of the Copyright Act, 17 U.S.C. § 102(b) (1982), which expressly states that copyright protection does not extend to facts or ideas.[12]

---

[10] Cliches, statements by others, as well as ideas, the District Court held, should not be "counted" against Random House and Mr. Hamilton. (App. A26-27) By contrast, the Court of Appeals decided that only "in one or two instances" could the portions of the letters allegedly copied be said to lack sufficient creativity to warrant copyright protection. (App. A16) In any event, the meticulous analysis by the District Court demonstrated that cliches and statements by others amounted only to about thirty words.

[11] The effects of the Court of Appeals' overly restrictive definition of paraphrase are not limited to technically unpublished source materials. These new limitations on paraphrase, if not reversed, would make it more difficult to report on previously published works as well, thus further impinging upon the ability of historians to make full and fair use of vital source materials.

[12] The Court of Appeals also concluded that the Salinger letters formed the qualitative heart of Hamilton's biography. (App. A16) In making this qualitative judgment, the Court of Appeals looked to the wrong work. Under the Copyright Act, the proper question is whether Hamilton took the qualitative heart of Salinger's letters. During his deposition, Mr. Salinger stated over and over that his letters had no qualitative heart — that they were essentially reports of unexceptional events and opinions, with no one part being more important than any other. (C.A. App. Vol. II at 934, 940, 942-43, 947-48)

Prior to this opinion the lower courts had long recognized that subsequent authors must be given a wide berth when it comes to conveying factual matters reported by an earlier author because those "wishing to express the ideas contained in the factual work often can choose from only a very narrow range of expression." *Landsberg v. Scrabble Crossword Game Players, Inc.*, 736 F.2d 485, 488 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984); *accord Harper & Row, Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 203 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985); *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 980 (2d. Cir.), *cert. denied*, 449 U.S. 841 (1980); *Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967). The Court of Appeals' opinion gives biographers and historians no breathing room at all.

If, as the Court of Appeals has held, a biographer cannot quote or even loosely paraphrase from unpublished materials, he will be forced to resort to increasing levels of abstraction. By necessity, increasing abstraction means increasing imprecision. In fact, Mr. Salinger has contended that if Mr. Hamilton used Mr. Salinger's words, he violated the Copyright Act but if he avoided using Salinger's words, he distorted the expressive contents of the letters and thereby violated the Lanham Act. Although the Court of Appeals dismissed the District Court's perceptive description of this dilemma as a Catch-22, Mr. Salinger's allegations reveal his real (and thus far realized) objective: to prevent the publication of any biography about him in his lifetime. This is hardly the goal of copyright.

III.

Copyright Law and the First Amendment Do not Permit Enjoining a Scholarly Biography to Prevent Brief Quotation from Letters

This Court said in *Harper & Row* that "[t]he rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors." 471 U.S. at 546. It concluded that "[b]y establishing a marketable right to the use of one's expression, copyright supplies the economic incentive to create and disseminate ideas." *Id.* at 558.

It simply cannot be seriously argued that letters are or are not written depending on the economic incentive embodied in the Copyright Act. Letters are written, as telephone calls are made, for the purpose of communicating. To enjoin a scholarly biography that makes incidental use of letters does not promote "the progress of science and useful arts." U.S. Const. art. I, § 8, cl. 8. Whatever this Court, as well as the court below, decides in this case, people will still write letters, memoranda, diaries, and take notes.[13] But whether the copyright law frustrates progress

---

[13] As one historian commented in evaluating the respective merits of autobiography, diaries, and letters as sources for biography:

> "One weakness of both autobiographies and diaries is that they result from a person's self-conscious efforts to record his actions or thoughts for future use of some kind. This is much less true of *letters*, which, in the words of Thomas Jefferson, usually, 'form the only full and genuine journal' of a man's life. Letters generally have the aim of transmitting information from one person to another for some *immediate* purpose. The letter-writer looks outward rather than inward, and is therefore less likely to traffic in rationalizations. This, of course, does not mean that letters tend to be written with greater frankness than more personal records. It means only that the letter-writer is not often (there are exceptions like Theodore Roosevelt) history-minded as he writes. He is concerned

(Footnote continued on next page)

of the arts by preventing any use of these materials, is very much at issue.

Because unpublished materials have never before the 1976 Act been controlled by federal copyright, this issue could not have arisen before the new act took effect. A construction of the federal Copyright Act that allows the banning and the possible destruction of a scholarly biography because of quotation or paraphrase of approximately 200 words of technically unpublished letters, does not begin to further the purposes of the Copyright Clause. Such a construction would render the Copyright Act constitutionally dubious.

At the same time, such an interpretation of the Copyright Act raises the most serious, and as yet undecided, questions of the relationship of copyright to the First Amendment. This Court has never passed upon the constitutionality of prior restraints in copyright actions. Although prior restraints in virtually every other area of law have been held to constitute "the most serious and the least tolerable infringement on First Amendment rights," *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), prior restraints in copyright have often been routinely issued on a finding of liability. *See New York Times Co. v. United States*, 403 U.S. 713, 731 n.1 (1971) (White, J., concurring).

This case illustrates the problem. The District Court expressed grave concerns about issuance of a preliminary injunction under the facts of this case: "Enjoining publication of a book," it concluded, "is a serious matter." (App. A41) The Court of Appeals disagreed, ordering the entry of an injunction with no deference to the District Court's discretion, no evaluation of Mr. Salinger's supposed irreparable harm, and no reference at all to

---

> with the present even more than the diarist, and much more than the autobiographer. Letters show a man in one form of interaction with his contemporaries, and thus offer insights into his personality that more self-centered personal documents do not."

J. Garraty, *supra*, at 195 (emphasis in original, footnote omitted); *see* J. Barzun & H. Graff, *supra*, at 131-33.

the balance of hardships, or the adequacy of money damages. According to the Court of Appeals, if any court decides a seriously disputed copyright question against the user, the user "deserves" to be enjoined without further discussion.

This ruling brings the Copyright Act into direct collision with the First Amendment.

In every previous instance in which a plaintiff has attempted to invoke the copyright laws to prevent the appearance of unauthorized biography or history, the courts have ultimately denied injunctive relief. *See, e.g., Estate of Hemingway v. Random House, Inc.*, 49 Misc. 2d 726, 728, 268 N.Y.S.2d 531, 534 (Sup. Ct. N.Y. Co.), *aff'd*, 25 A.D.2d 719, 269 N.Y.S.2d 366 (1st Dep't 1966); *Meeropol v. Nizer*, 361 F. Supp. 1063 (S.D.N.Y. 1973); *Rosemont Enterprises, Inc. v. Random House, Inc., supra*, 366 F.2d at 306 (preliminary injunction vacated). Now, for what may well be the first time in the history of American scholarship, an appellate court has countenanced the effort of a public figure to veto publication of a book of which he disapproves.

Historically, this Court has recognized that there are two important safety valves that prevent the property interests protected by copyright law from seriously encroaching upon free expression: the fair use doctrine and the idea/expression dichotomy. *Harper & Row*, 471 U.S. at 556, 560; *see* Denicola, *Copyright and Free Speech: Constitutional Limitations on the Protection of Expression*, 67 Cal. L. Rev. 283, 299 (1979). The courts have generally taken into account the strong public interest favoring publication of historical works in analyzing these two issues.

> "Biographies, of course, are fundamentally personal histories and it is both reasonable and customary for biographers to refer to and utilize earlier works dealing with the subject of the work and occasionally to quote directly from such works. . . . This practice is permitted because of the public benefit in encouraging the development of historical and biographical works and their public distribution, e.g., so 'that the world may not be deprived of improvements, or the progress of the arts be retarded.' "

Rosemont Enterprises, Inc. v. Random House, Inc., *supra*, 366 F.2d at 307. *See also Maxtone-Graham v. Burtchaell*, 803 F.2d 1253 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 2201 (1987).

The decision of the Court of Appeals has now tightly sealed both of these safety valves when the copyrighted work is technically "unpublished." The Court of Appeals ignored all prior cases that have recognized that authors of historical and factual works must be given considerable latitude to paraphrase source materials. *See, e.g., Hoehling v. Universal City Studios, Inc.*, *supra*, 618 F.2d at 980. Most disturbingly, in discussing both of these issues – and in the course of directing the issuance of a prior restraint – the Court of Appeals disregarded the public interest in publication of biographical and historical works discussing important public figures. *Cf. Maxtone-Graham v. Burtchaell*, *supra*, 803 F.2d at 1263.[14]

The imposition by the Court of Appeals of a prior restraint on publication in this case is particularly violative of basic First Amendment values. The District Court had found that publication of the biography would have "no effect" on the marketability of the Salinger letters. (App. A39) Even the Court of Appeals conceded that the effect on the market would be slight. (App. A17-18) Nevertheless, in order to prevent only a slight or nonexistent injury to the marketability of technically unpublished letters, the Court of Appeals restrained the publication of a biography of an important public figure.[15] In the past, such a

---

[14] Actually, as the District Court perceived, this is not a case of copyright infringement at all. (App. A42) During his deposition, Mr. Salinger candidly admitted that the letters at issue have no value to him as literary property; in fact he suggested that he might destroy similar letters in his possession. (C.A. App. Vol. II at 953) Mr. Salinger also acknowledged that he objects to publication of this biography only because it interferes with his desire for privacy. (C.A. App. Vol. II at 925, 953) As Judge Leval concluded: "The copyright law does not give him protection against that form of injury." (App. A42)

[15] The Court of Appeals ignored all prior authority that had suggested that a prior restraint on publication in circumstances such as these raised serious constitutional questions. In particular, the court below did not mention *Estate of*

(Footnote continued on next page)

drastic remedy has ordinarily been denied when, as here, plaintiff's damages appear to be trivial or the injunction might work an injury to the defendant out of proportion to the damages that might result to the plaintiff from the failure to issue the injunction. *See, e.g., Apple Barrel Productions, Inc. v. Beard*, 730 F.2d 384 (5th Cir. 1984); *Belushi v. Woodward*, 598 F. Supp. 36 (D.D.C. 1984); *Blazon, Inc. v. DeLuxe Game Corp.*, 268 F. Supp. 416 (S.D.N.Y. 1965); *Consumers Union of United States, Inc. v. Hobart Manufacturing Co.*, 189 F. Supp. 275 (S.D.N.Y. 1960).

Hemingway v. Random House, Inc., supra, 49 Misc. 2d at 728, 268 N.Y.S.2d at 534, a landmark case also involving unpublished letters, which stated:

> "A preliminary injunction is always a drastic remedy and the one seeking to invoke such stringent relief is obliged to establish a clear and compelling legal right thereto based upon undisputed facts. The normal reluctance to impose a summary restraint in advance of a full and complete trial is particularly acute in a case such as this which deals with the publication of a book. Before the court will intrude into an area fraught with sensitivity in its possible impingement upon fundamental democratic and intellectual institutions, it will require a showing by the movant of a right, both legal and factual, in most unequivocal terms."

Rosemont Enterprises, Inc. v. Random House, Inc., supra, 366 F.2d at 309, made a similar point:

> "By this preliminary injunction, the public is being deprived of an opportunity to become acquainted with the life of a person [Howard Hughes] endowed with extraordinary talents who, by exercising these talents, made substantial contributions in the fields to which he chose to devote his unique abilities. . . .
>
> "Hughes has almost an obsession as to his privacy and his right thereto. However, when one enters the public arena to the extent he has, the right of privacy must be tempered by a countervailing privilege that the public have some information concerning important public figures. . . .
>
> "Thus, in balancing the equities at this time in our opinion the public interest should prevail over the possible damage to the copyright owner."

When brief quotations such as these are at issue, the extreme remedy of a prior restraint on publication serves only to exalt the most speculative property interests over the interests of the public. The ruling encourages last minute efforts of disgruntled subjects of biographies to thwart publication. Rather than face the possibility of a prepublication injunction that could destroy a publishing project, publishers may be forced to excise from biographies all quotations and paraphrases derived from technically unpublished materials. *See, e.g.*, Benedict, *supra*, at 870. The result would be to deprive the public of the accuracy, the perceptiveness, the utility and the beauty of historical writing.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the opinion of the United States Court of Appeals for the Second Circuit.

Dated: New York, New York
July 31, 1987

Respectfully submitted,

ROBERT M. CALLAGY
MARK A. FOWLER
SATTERLEE & STEPHENS
230 Park Avenue
New York, New York 10169
(212) 818-9200

FLOYD ABRAMS
Counsel of Record
DEVEREUX CHATILLON
CAHILL GORDON & REINDEL
(a partnership including
professional corporations)
80 Pine Street
New York, New York 10005
(212) 701-3000

A P P E N D I X

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 657—August Term, 1986

(Argued: December 3, 1986 Decided: January 29, 1987)

Docket No. 86-7957

JEROME D. SALINGER a/k/a J.D. SALINGER,
Plaintiff-Appellant.

— v. —

RANDOM HOUSE, INC. and IAN HAMILTON,
Defendants-Appellees.

Before:

NEWMAN and MINER,
*Circuit Judges.**

*Judge Mansfield, originally a member of the panel, died on January 7, 1987. The appeal is being decided by the remaining members of the panel pursuant to Local Rule § 0.14(b).

Appeal from an order of the District Court for the Southern District of New York (Pierre N. Leval, Judge) denying a preliminary injunction sought by plaintiff alleging infringement of copyright in his unpublished letters.

Reversed and remanded with directions to issue a preliminary injunction.

Marcia B. Paul, New York, N.Y. (R. Andrew Boose, Jeremy Nussbaum, M. Graham Coleman, 2d, Kay Collyer & Boose, New York, N.Y., on the brief), for plaintiff-appellant.

Robert M. Callagy, New York, N.Y. (Mark A. Fowler, Satterlee & Stephens, New York, N.Y., on the brief), for defendants-appellees.

JON O. NEWMAN, *Circuit Judge*:

This appeal presents the issue whether the biographer of a renowned author has made "fair use" of his subject's unpublished letters. The issue arises on an expedited appeal from an order of the District Court for the Southern District of New York (Pierre N. Leval, Judge) denying a preliminary injunction sought by the well-known writer, J.D. Salinger, against Ian Hamilton and Random House, Inc., the author and publisher, respectively, of a book about Salinger and his writings. For reasons that follow, we conclude that a preliminary injunction should be issued.

Background

The plaintiff J.D. Salinger is a highly regarded American novelist and short-story writer, best known for his novel, *The Catcher in the Rye*. He has not published since 1965 and has chosen to shun all publicity and inquiry concerning his private life. The defendant Ian Hamilton is a well-respected writer on literary topics. He serves as literary critic of *The London Sunday Times* and has authored a biography of the poet Robert Lowell. In July 1983 Hamilton informed Salinger that he was undertaking a biography of Salinger to be published by Random House and sought the author's cooperation. Salinger refused, informing Hamilton that he preferred not to have his biography written during his lifetime. Hamilton nevertheless proceeded and spent the next three years preparing a biography titled *J.D. Salinger: A Writing Life*.

An important source of material was several unpublished letters Salinger wrote between 1939 and 1961. Most were written to Whit Burnett, Salinger's friend, teacher, and editor at *Story* magazine, and Elizabeth Murray, Salinger's friend. A few were written to Judge Learned Hand,[1] Salinger's friend and neighbor in New Hampshire. Hamish Hamilton and Roger Machell, Salinger's British publishers, and other individuals including Ernest Hemingway.

---

[1]Of historical interest is the fact that this is not the first time a prominent jurist has figured in litigation concerning the copyright protection available for private letters. In what was probably the first federal decision concerning a copyright in letters, Justice Story noted that the rights to the published letters of George Washington, which had been extensively copied in a biography, had been obtained by Chief Justice Marshall and Jared Sparks from President Washington's nephew, Justice Bushrod Washington. *See Folsom v. Marsh*, 9 F. Cas. 342, 345 (C.C.D. Mass. 1841) (No. 4,901).

Ian Hamilton located most, if not all, of the letters in the libraries of Harvard, Princeton, and the University of Texas, to which they had been donated by the recipients or their representatives. Prior to examining the letters at the university libraries, Hamilton signed form agreements furnished by the libraries, restricting the use he could make of the letters without permission of the library and the owner of the literary property rights. The Harvard form required permission "to publish the contents of the manuscript or any excerpt therefrom." The Princeton form obliged the signer "not to copy, reproduce, circulate or publish" inspected manuscripts without permission.

By May 1986 Hamilton had completed a version of his biography. Salinger received a set of the galley proofs of this version (the "May galleys") and learned from the galleys and the footnote citations to his letters that the letters had been donated to university libraries. In response, he took two actions. First, he registered 79 of his unpublished letters for copyright protection. Second, he instructed his counsel to object to publication of the biography until all of Salinger's unpublished materials were deleted.

In response to Salinger's objection, Hamilton and Random House revised the May galleys. In the current version of the biography (the "October galleys"), much of the material previously quoted from the Salinger letters has been replaced by close paraphrasing.[2] Somewhat more

[2]The closeness of the paraphrasing is illustrated by comparison of a passage from a 1943 letter to Whit Burnett with Hamilton's report of what Salinger had written on that occasion. Salinger, distressed that Oona O'Neil, whom he had dated, had married Charlie Chaplin, expressed his disapproval of the marriage in this satirical invention of his imagination:

> I can see them at home evenings. Chaplin squatting grey and nude, atop his chiffonier, swinging his thyroid around his head by his bam-

than 200 words remain quoted. Salinger has identified 59 instances where the October galleys contain passages that either quote from or closely paraphrase portions of his unpublished letters. These passages draw upon 44 of the copyrighted letters, 20 to Burnett, 10 to Murray, 9 to Hamish Hamilton, 3 to Judge Hand, 1 to Machell, and 1 to Hemingway.[3]

On October 3, 1986, Salinger sued Ian Hamilton and Random House, seeking an injunction against publication of Hamilton's biography and damages. In addition to

---

> boo cane, like a dead rat. Oona in an aquamarine gown, applauding madly from the bathroom. Agnes (her mother) in a Jantzen bathing suit, passing between them with cocktails. I'm facetious, but I'm sorry. Sorry for anyone with a profile as young and lovely as Oona's.

Hamilton, not content to report the fact that Salinger was distressed that O'Neil had married Chaplin or that in his mind he imagined how disastrous their life together must be, writes the following:

> At one point in a letter to Whit Burnett, he provides a pen portrait of the Happy Hour Chez Chaplin: the comedian, ancient and unclothed, is brandishing his walking stick—attached to the stick, and horribly resembling a lifeless rodent, is one of Chaplin's vital organs. Oona claps her hands in appreciation and Agnes, togged out in a bathing suit, pours drinks. Salinger goes on to say he's sorry—sorry not for what he has just written, but for Oona: far too youthful and exquisite for such a dreadful fate.

Even the briefest similes are closely paraphrased. Salinger, expressing his unfavorable opinion in 1940 of presidential candidate Wendell Willkie, wrote Burnett: "He looks to me like a guy who makes his wife keep a scrapbook for him." Hamilton reports that Salinger "had fingered [Willkie] as the sort of fellow who makes his wife keep an album of his press cuttings."

[3]The excerpts from the biography complained of by Salinger include one passage that Hamilton has footnoted with a reference to an additional letter to Elizabeth Murray dated December 3, 1941. However, the list of letters to Murray appearing on the copyright registration do not contain such a letter, and the paraphrased excerpt does not appear in any of the letters to Murray included in the record. This discrepancy has no bearing on our disposition of any issue in the appeal.

copyright infringement, the complaint alleged unfair competition and breach of contract. The unfair competition claim was based on instances in the biography where Hamilton uses phrases such as "he states" or "he writes" to introduce close paraphrases of portions of Salinger's letters; Salinger claimed that readers would be deceived into thinking that they were reading Salinger's exact words. The breach of contract claim was based on the form agreements that Hamilton signed with the Harvard, Princeton, and University of Texas libraries. Salinger alleged that he was a third-party beneficiary of those agreements.

Judge Leval granted a temporary restraining order but subsequently issued an opinion denying a preliminary injunction. _ F. Supp. _ . In the District Judge's view, the extent of copying of expressive material entitled to copyright protection was "minimal," amounting to "about 30 instances of the use of a word or a phrase or an image." *Id.* at _ . Building on the premise that only such fragmentary copying of protected material was involved, Judge Leval concluded that "Hamilton's appropriations of copyrighted expressions are too minimal to subject Salinger to any serious harm." *id.* at _. and that such use as Hamilton had made was "fair use" within the meaning of the Copyright Act, 17 U.S.C. § 107 (1982). Judge Leval rejected the unfair competition claim, finding "no showing of distortions that would give rise to a Lanham Act claim." *Id.* at _ . He also rejected the contract claim, concluding that the library agreements are to be construed not to prevent all quotations but only "quotations and excerpts *that infringe copyright.*" *Id.* at (emphasis in original). The claim therefore fell with the conclusion that the infringement claim was defeated by the defense of fair use. Judge Leval also noted that the letters in the Harvard and Texas

libraries had not been directly quoted and that the Princeton form did not expressly forbid quotation.

The District Court granted a limited stay, which this Court extended pending an expedited appeal.

Discussion

Rulings on applications for a preliminary injunction are reviewed under an "abuse of discretion" standard. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931-32 (1975); *LeSportsac, Inc. v. K Mart Corp.*, 754 F.2d 71, 74 (2d Cir. 1985). Misapplication of the appropriate legal principles constitutes grounds for overturning the denial or issuance of a preliminary injunction. See *Parents' Association of P.S. 16 v. Quinones*, 803 F.2d 1235, 1239 (2d Cir. 1986); *Coca-Cola Co. v. Tropicana Products, Inc.*, 690 F.2d 312, 315 (2d Cir. 1982); *see generally* 7 *Moore's Federal Practice* ¶ 65.04[2] at 65-48-49, ¶ 65.21 at 65-154-57 (2d ed. 1986 & Supp. 1986-87).

To a large extent the appropriate legal principles are not in dispute on this appeal, though their application is seriously contested. The author of letters is entitled to a copyright in the letters, as with any other work of literary authorship. *See Meeropol v. Nizer*, 560 F.2d 1061, 1069 (2d Cir.), *cert. denied*, 434 U.S. 1013 (1977); *Folsom v. Marsh*, 9 F. Cas. 342, 346 (C.C.D. Mass. 1841) (No. 4,901); 1 *Nimmer on Copyright* § 5.04 (1986); W. Patry, *Latman's The Copyright Law* 130 (6th ed. 1986). Prior to 1978, unpublished letters, like other unpublished works, were protected by common law copyright, but the 1976 Copyright Act preempted the common law of copyright, 17 U.S.C. § 301(a), and brought unpublished works under the protection of federal copyright law, which includes the right of first publication among the rights accorded to the

copyright owner. *id.* § 106(3). The copyright owner owns the literary property rights, including the right to complain of infringing copying, while the recipient of the letter retains ownership of "the tangible physical property of the letter itself." 1 *Nimmer, supra*, § 5.04 at 5-32 (footnote omitted). Having ownership of the physical document, the recipient (or his representative) is entitled to deposit it with a library and contract for the terms of access to it. As with all works of authorship, the copyright owner secures protection only for the expressive content of the work, not the ideas or facts contained therein, *see Reyher v. Children's Television Workshop*, 533 F.2d 87, 90 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976), a distinction fundamental to copyright law and of special significance in determining whether infringement has occurred in a work of biography or other account of historical or contemporary events. *See Rosemont Enterprises, Inc. v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir. 1966), *cert. denied*, 385 U.S. 1009 (1967).

Central to this appeal is the application of the defense of "fair use" to unpublished works. Though common law, especially as developed in England, appears to have denied the defense of fair use to unpublished works, *see* W. Patry, *The Fair Use Privilege in Copyright Law* 436-41 (1985), the 1976 Act explicitly makes all of the rights protected by copyright, including the right of first publication, subject to the defense of fair use. *See* 17 U.S.C. § 107. That fair use applies to unpublished works does not determine, however, the scope of the defense as applied to such works. Whatever glimmerings on that subject have appeared in cases decided before May 20, 1985, *see, e.g., Diamond v. Am-Law Publishing Corp.*, 745 F.2d 142 (2d Cir. 1984) (applying fair use to a letter to the editor of a newspaper, which, though not previously printed, was

obviously intended for dissemination); *Sinkler v. Goldsmith*, 623 F. Supp. 727 (D. Ariz. 1985); *Schuchart & Assocs., Professional Engrs., Inc. v. Solo Serve Corp.*, 220 U.S.P.Q. 170 (W.D. Tex. 1983), our guidance must now be taken from the decision of the Supreme Court on that date in *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985), the Court's first delineation of the scope of fair use as applied to unpublished works.

The Court begins its discussion of fair use by considering the application of the doctrine to unpublished works. The Court observes that "fair use traditionally was not recognized as a defense to charges of copying from an author's as yet unpublished works," *id.* at 550-51 (footnote omitted), but that this "absolute rule" was "tempered in practice by the equitable nature of the fair use doctrine." *Id.* at 551. The Court notes that, under the Copyright Revision Act of 1976, all of the rights protected by copyright, including the right of first publication, are subject to fair use, *see* 17 U.S.C. §§ 106, 107, but explicitly rejects the contention, advanced by *The Nation*, that Congress "intended that fair use would apply *in pari materia* to published and unpublished works." 471 U.S. at 552. "Under ordinary circumstances," the Court states, "the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use." *Id.* at 555. This proposition was emphasized with respect to unpublished letters. Reckoning with *The Nation*'s argument that fair use could permissibly be made of President Ford's unpublished memoirs because the imminent publication demonstrated that the author has no interest in nonpublication, the Court said, "This argument assumes that the unpublished nature of copyrighted material is only relevant to letters or other confidential writings not intended for dissemination," *id.* at

554, an assumption the Court went on to reject. Pertinent to our case is the fact that the Court underscored the idea that unpublished letters normally enjoy insulation from fair use copying.

After emphasizing the insulation of unpublished works from fair use under "ordinary circumstances," the Court considers in turn each of the four factors identified by Congress as "especially relevant," *id.* at 560, in determining whether a use is fair. *See* 17 U.S.C. § 107. Reflecting its earlier discussion, the Court gives special weight to the fact that the copied work is unpublished when considering the second factor, the nature of the copyrighted work. *Id.* at 564.

Following the Supreme Court's approach in *Harper & Row*, we place special emphasis on the unpublished nature of Salinger's letters and proceed to consider each of the four statutory fair use factors. Application of these four factors points in Salinger's favor.

1. *Purpose of the use.* Hamilton's book fits comfortably within several of the statutory categories of uses illustrative of uses that can be fair. The book may be considered "criticism," "scholarship," and "research." *See* 17 U.S.C. 107. The proposed use is not an attempt to rush to the market just ahead of the copyright holder's imminent publication, as occurred in *Harper & Row*. Whether Random House plans to "exploit the headline value of its infringement," *Harper & Row, supra*, 471 U.S. at 561, as *The Nation* did, is not clear on the record thus far developed. Though no evidence has yet been presented on the advertising materials Random House plans to use, it is hard to believe that some emphasis will not be placed upon the fact that the book draws generously upon Salinger's unpublished letters.

We agree with Judge Leval that Hamilton's purpose in using the Salinger letters to enrich his scholarly biography weighs the first fair use factor in Hamilton's favor, notwithstanding that he and his publisher anticipate profits. However, we do not agree that a biographer faces a dilemma that entitles him to a generous application of the fair use doctrine. Judge Leval perceived the dilemma in these terms:

> To the extent [the biographer] quotes (or closely paraphrases), he risks a finding of infringement and an injunction effectively destroying his biographical work. To the extent he departs from the words of the letters, he distorts, sacrificing both accuracy and vividness of description.

_ F. Supp. at _ . This dilemma is not faced by the biographer who elects to copy only the factual content of letters. The biographer who copies only facts incurs no risk of an injunction: he has not taken copyrighted material. And it is unlikely that the biographer will distort those facts by rendering them in words of his own choosing. On the other hand, the biographer who copies the letter writer's expression of facts properly faces an unpleasant choice. If he copies more than minimal amounts of (unpublished) expressive content, he deserves to be enjoined; if he "distorts" the expressive content, he deserves to be criticized for "sacrificing accuracy and vividness." But the biographer has no inherent right to copy the "accuracy" or the "vividness" of the letter writer's expression. Indeed, "vividness of description" is precisely an attribute of the author's expression that he is entitled to protect.

The point is sharply, though unwittingly, made by defendant Hamilton in the course of his deposition in this case. On cross-examination, he is pressed as to why he

copied a stylistic device that Salinger had employed in one of the letters. He responds: "I wanted to convey the fact that [Salinger] was adopting an ironic term . . . ." When the cross-examiner asks, "Couldn't you have stated that he had an ironic tone," Hamilton replies, "That would make a pedestrian sentence I didn't wish to put my name to." (A-925c).[4] But when dealing with copyrighted expression, a biographer (or any other copier) may frequently have to content himself with reporting only the fact of what his subject did, even if he thereby pens a "pedestrian" sentence. The copier is not at liberty to avoid "pedestrian" reportage by appropriating his subject's literary devices.

In sum, we agree with the District Court that the first fair use factor weighs in Hamilton's favor, but not that the purpose of his use entitles him to any special consideration.

2. *Nature of the Copyrighted Work.* "The fact that a work is unpublished is a critical element of its 'nature' ". *Harper & Row, supra,* 471 U.S. at 564. Salinger's letters are unpublished, and they have not lost that attribute by their placement in libraries where access has been explicitly made subject to observance of at least the protections of copyright law. In considering this second factor, we encounter some ambiguity arising from the Supreme Court's observation that "the *scope* of fair use is narrower with respect to unpublished works." *Id.* (emphasis added).

---

[4]This was not an ill-considered slip of the tongue. Pressed as to why he closely paraphrased Salinger's comment that Wendell Willkie "looks to me like a guy who makes his wife keep a scrapbook for him" instead of just reporting that he thought Willkie was vain, Hamilton replied, "Because that is, again, laborious, pedestrian." To avoid the "pedestrian," Hamilton reported Salinger's expression that Willkie was "the sort of fellow who makes his wife keep an album of his press cuttings."

This could mean either that the circumstances in which copying will be found to be fair use are fewer in number for unpublished works than for published works or that the amount of copyrighted material that may be copied as fair use is a lesser quantity for unpublished works than for published works. Some support for the latter view can be derived from the statement in *Harper & Row* that, though "substantial" quotations might be used in a review of a published work, the author's right to control first publication weighs against "such use" prior to publication. *Id.* However, we think that the tenor of the Court's entire discussion of unpublished works conveys the idea that such works normally enjoy complete protection against copying any protected expression. Narrower "scope" seems to refer to the diminished *likelihood* that copying will be fair use when the copyrighted material is unpublished.

The District Judge considered the nature of the copyrighted work, especially its unpublished nature, primarily in rejecting the plaintiff's argument that fair use was inapplicable to unpublished works. However, in analyzing and weighing the fair use factors, Judge Leval gave no explicit consideration to this second factor. Since the copyrighted letters are unpublished, the second factor weighs heavily in favor of Salinger.

3. *Amount and Substantiality of the Portion Used.* It is with regard to this third factor that we have the most serious disagreement with the District Judge's legal analysis, both as to the pertinent standard and its application. As to the standard, we start, as did Judge Leval, by recognizing that what is relevant is the amount and substantiality of the copyrighted *expression* that has been used, not the *factual content* of the material in the copyrighted works. However, that protected expression has been "used"

whether it has been quoted verbatim or only paraphrased. *See Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930), *cert. denied*, 282 U.S. 902 (1931); 3 *Nimmer, supra*, § 13.03[A] at 13-20.1. We cannot be certain that Judge Leval included close paraphrases of the Salinger letters in his determination of the quantity of copyrighted material that has been used in the Hamilton biography. At one point in his decision, Judge Leval states that he has identified "approximately 30 letters from which Hamilton has taken, either by brief quotation or *paraphrase*, a few works of copyright protected material." _ F. Supp. at _ (emphasis added). At other points, however, his opinion suggests that only direct quotations have been counted. Noting that Hamilton had revised the May galleys "by eliminating and writing around most of the quoted matter" previously appearing in that version of the book, Judge Leval concluded that what Hamilton accomplished "was to reduce from a large number to fewer than 30 the instances of use of copyrighted expression." *Id.* at _ . This strongly suggests that passages quoted in the May galleys but paraphrased in the October galleys were not counted as instances of use of copyrighted expression. Moreover, of the 59 passages of the Hamilton biography complained of by Salinger, 24 contain direct quotations from the letters, perhaps constituting the "fewer than 30" instances the District Judge had in mind. Furthermore, Judge Leval states, "In the rarest case, a complete sentence is taken." *id.* at _, citing to a passage in the October galleys that contains a full sentence quoted from one of Salinger's letters. If the District Judge had included paraphrases, he would have noticed numerous instances where the quantity of material taken from a single letter greatly exceeded a single sentence.

Even if Judge Leval included paraphrases, we conclude that he misapplied the governing standard in determining

the number of instances in which Hamilton has used Salinger's copyrighted expression. The District Judge rejected Salinger's claim of infringement as to several passages of the letters because they "employ[ed] a cliche or a word-combination that is so ordinary that it does not qualify for the copyright law's protecion." *Id.* at _ . Though a cliche or an "ordinary" word-combination by itself will frequently fail to demonstrate even the minimum level of creativity necessary for copyright protection, *see, e.g., Alberto-Culver Co. v. Andrea Dumon, Inc.*, 466 F.2d 705, 711 (7th Cir. 1972); W. Patry, *Latman's The Copyright Law, supra*, at 23-24, such protection is available for the "association, presentation, and combination of the ideas and thought which go to make up the [author's] literary composition." *Nutt v. National Institute Inc. for the Improvement of Memory*, 31 F.2d 236, 237 (2d Cir. 1929). Or as we have more recently stated, "What is protected is the manner of expression, the author's analysis or interpretation of events, the way he structures his material and marshals facts, his choice of words and the emphasis he gives to particular developments." *Wainwright Securities, Inc. v. Wall Street Transcript Corp.*, 558 F.2d 91, 95-96 (2d Cir. 1977), *cert. denied*, 434 U.S. 1014 (1978). The "ordinary" phrase may enjoy no protection as such, but its use in a sequence of expressive words does not cause the entire passage to lose protection. And though the "ordinary" phrase may be quoted without fear of infringement, a copier may not quote or paraphrase the sequence of creative expression that includes such a phrase.

In almost all of those instances where the quoted or paraphrased passages from Salinger's letters contain an "ordinary" phrase, the passage as a whole displays a sufficient degree of creativity as to sequence of thoughts,

choice of words, emphasis, and arrangement to satisfy the minimal threshold of required creativity. And in all of the instances where that minimum threshold is met, the Hamilton paraphrasing tracks the original so closely as to constitute infringement.

We have carefully analyzed all 59 of the passages from Hamilton's book cited by Salinger as instances of infringing copying from 44 of his letters. Of these 44 letters, the Hamilton biography copies (with some use of quotation or close paraphrase) protected sequences constituting at least one-third of 17 letters and at least 10 percent of 42 letters. These sequences are protected, notwithstanding that they include some reporting of facts and an occasional use of a commonplace word or expression. Hamilton's use of these sequences "exceeds that necessary to disseminate the facts." *Harper & Row, supra*, 471 U.S. at 564. Judge Leval found that "[i]n the rarest case a complete sentence was taken." _ F. Supp. at _ . That is true only with respect to material directly quoted. The material closely paraphrased frequently exceeds ten lines from a single letter. Even if in one or two instances the portions of the letters copied could be said to lack sufficient creativity to warrant copyright protection, there remains sufficient copying of protected material to constitute a very substantial appropriation.

The taking is significant not only from a quantitative standpoint but from a qualitative one as well. The copied passages, if not the " 'heart of the book,' " *Harper & Row, supra*, 471 U.S. at 565 (quoting the District Court's opinion, 557 F. Supp. at 1072), are at least an important ingredient of the book as it now stands. To a large extent, they make the book worth reading. The letters are quoted or paraphrased on at least 40 percent of the book's 192 pages.

In sum, the third fair use factor weighs heavily in Salinger's favor.

4. *Effect on the Market.* The Supreme Court has called the fourth factor—effect on the market for the copyrighted work—"the single most important element of fair use." *Harper & Row, supra,* 471 U.S. at 566 (footnote omitted). As Judge Leval recognized, the need to assess the effect on the market for Salinger's letters is not lessened by the fact that their author has disavowed any intention to publish them during his lifetime. First, the proper inquiry concerns the "potential market" for the copyrighted work. 17 U.S.C. § 107(4); *see Pacific and Southern Co. v. Duncan,* 744 F.2d 1490, 1496-97 (11th Cir. 1984), *cert. denied,* 471 U.S. 1004 (1985). Second, Salinger has the right to change his mind. He is entitled to protect his *opportunity* to sell his letters, an opportunity estimated by his literary agent to have a current value in excess of $500,000.

Proceeding from his conclusion that only a few fragments of the letters have been used in Hamilton's book, Judge Leval expressed the view that such use would have "no effect" on the marketability of the letters. _ F. Supp. at _ . Concluding as we do that substantial portions of the letters have been copied, we do not share the District Judge's view that marketability of the letters will be totally unimpaired. To be sure, the book would not displace the market for the letters. Indeed, we think it likely that most of the potential purchasers of a collection of the letters would not be dissuaded by publication of the biography. Yet some impairment of the market seems likely. The biography copies virtually all of the most interesting passages of the letters, including several highly expressive insights about writing and literary criticism. Perhaps few

readers of the biography would refrain from purchasing a published collection of the letters if they appreciated how inadequately Hamilton's paraphrasing has rendered Salinger's chosen form of expression.[5] The difficulty, however, is that some readers of the book will gain the impression that they are learning from Hamilton what Salinger has written. Hamilton frequently laces his paraphrasing with phrases such as "he wrote," "said Salinger," "he speaks of," "Salinger declares," "he says," and "he said."[6] For at least some appreciable number of persons, these phrases will convey the impression that they have read Salinger's words, perhaps not quoted verbatim, but paraphrased so closely as to diminish interest in purchasing the originals.

The fourth fair use factor weighs slightly in Salinger's favor.

---

[5]A few examples should suffice. Salinger, complaining of an editor who has rejected one of his stories though calling it "[c]ompetent handling," writes: "Like saying, She's a beautiful girl, except for her face." Hamilton paraphrases: "How would a girl feel if you told her she was stunning to look at but that facially there was something not quite right about her?"

Salinger writes: "I suspect that money is a far greater distraction for the artist than hunger." Hamilton paraphrases: "Money, on the other hand is a serious obstacle to creativity."

Salinger, conveying the adulation of Parisians toward Americans at the liberation of Paris, writes that they would have said, " 'What a charming custom!' " if "we had stood on top of the jeep and taken a leak." Hamilton paraphrases: if "the conquerors had chosen to urinate from the roofs of their vehicles."

[6]In the District Court Salinger contended that Hamilton's use of such phrases, inserted among close paraphrases, would confuse and deceive the public, thereby creating a cause of action for unfair competition. This claim is not pursued on this appeal. Nevertheless, it is fairly arguable that the repeated use of phrases having the tendency to create the misimpression that Salinger's own words are being reported cuts substantially against any contention that Hamilton's use of the letters is "fair."

On balance, the claim of fair use as to Salinger's unpublished letters fails. The second and third factors weigh heavily in Salinger's favor, and the fourth factor slightly so. Only the first factor favors Hamilton. We seriously doubt whether a critic reviewing a published collection of the letters could justify as fair use the extensive amount of expressive material Hamilton has copied. However that may be, if fair use is to have a more "limited scope" with respect to unpublished works, it is not available with respect to the current version of Hamilton's proposed biography.

To deny a biographer like Hamilton the opportunity to copy the expressive content of unpublished letters is not, as appellees contend, to interfere in any significant way with the process of enhancing public knowledge of history or contemporary events. The facts may be reported. Salinger's letters contain a number of facts that students of his life and writings will no doubt find of interest, and Hamilton is entirely free to fashion a biography that reports these facts. But Salinger has a right to protect the expressive content of his unpublished writings for the term of his copyright, and that right prevails over a claim of fair use under "ordinary circumstances," *Harper & Row*, *supra*, 471 U.S. at 555. Public awareness of the expressive content of the letters will have to await either Salinger's decision to publish or the expiration of his copyright, save for such special circumstances as might fall within the "narrower" scope of fair use available for unpublished works, *id.* at 564. Evidently, public interest in the expressive content of the letters of a well-known writer remains substantial even fifty years after his death. *See, e.g.*, "516 Pirandello Letters Donated to Princeton," *The New York Times*, Dec. 29, 1986, at C13, col. 1 (reporting the great interest in the donation of the unpublished letters of Luigi

Pirandello to the Princeton Library fifty years after the playwright's death).

Since we conclude that the record establishes Salinger's entitlement to a preliminary injunction on his copyright claim, we need not consider at this stage of the litigation whether he is also entitled to relief by virtue of the library agreements.

Reversed and remanded with directions to issue a preliminary injunction barring publication of the biography in its present form.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JEROME D. SALINGER, a/k/a J.D. SALINGER,

Plaintiff,

86 Civ. 7574 (P

– against –

RANDOM HOUSE, INC. and IAN HAMILTON,

Defendants.

Kaye Collyer & Boose, New York City (R. Andrew Boose, Jeremy Nussbaum, Marcia B. Paul, M. Graham Coleman, 2d of counsel), for plaintiff.

Satterlee & Stephens, New York City (Robert M. Callagy, Mark A. Fowler, of counsel), for defendants.

LEVAL, District Judge.

J.D. Salinger, the celebrated author of *The Catcher in the Rye*, *Franny and Zooey*, *Raise High the Roof Beam, Carpenters*, and many short stories, brings this action against Ian Hamilton and Random House, Inc., who are respectively the author and publisher of an unauthorized and as-yet unpublished biography entitled *J.D. Salinger: A Writing Life*. The biography draws heavily from copyrighted letters written by Salinger many years ago. The complaint alleges copyright infringement, unfair competition, and breach of undertakings Hamilton made with libraries as a condition of access to some of the letters. Salinger moves for a preliminary injunction restraining distribution of the biography.

Hamilton is a writer, literary critic, and poet. After Random House published his well-respected *Robert Lowell: A Biography* in 1982, Hamilton set out to chronicle Salinger's life.

He received advances of $100,000 from Random House and £25,000 from the British publisher William Heinemann. In July 1983, he wrote to Salinger requesting his cooperation.

Salinger for some 30 years had maintained a reclusive privacy, avoiding all publicity. He replied that he would regard any biography written during his lifetime as an invasion of privacy.

Hamilton nonetheless proceeded with his research. He had little success until his discovery of "a tremendous autobiographical resource" (Hamilton Aff. ¶8) – several series of letters written by Salinger years before, some of which had been lodged by the recipients (or their estates) in research libraries at Harvard, Princeton, and the University of Texas. Hamilton also found a bibliography of Salinger materials, edited by Jack Sublette and published by Garland Press, Inc. in 1984, which referred to and quoted letters deposited with Princeton's library. Salinger was unaware of the Sublette bibliography and of the deposits of his letters in the libraries.

In order to gain access to the letters at Princeton, Harvard, and the University of Texas, Hamilton signed the libraries' standard form agreements in which he undertook not to publish the documents without their permission and that of the copyright holder. The "Princeton University Library Request for Access to Manuscripts," for example, states in part:

> I understand that Princeton University holds manuscripts for purposes of research and scholarship. I agree not to copy, reproduce, circulate or publish them without the permission of Princeton University Library and of the owner of the literary property rights, if any. I assume all responsibility for any infringement by me of the literary property rights held by others in the material requested.

Hamilton submitted his manuscript in September 1985. It contained very substantial quotation from approximately 70 of the letters. In May 1986, galleys were sent to book reviewers, as well as to potential licensees in the publishing industry, and some advance reviews appeared.

Salinger somehow received a copy of the May Galleys. Then realizing that copies of his letters had been donated by their recipients to the libraries, he caused the letters to be registered for copyright protection in his name. On May 30, 1986, his attorneys wrote to Hamilton and Random House demanding that the book not be published unless and until all of Salinger's unpublished materials were deleted. Defendants then sought the libraries' permission to quote from the correspondence, but without success.

In response to Salinger's demand, Hamilton revised the book to reduce drastically the amount of direct quotation. He revised, rewrote or paraphrased most of the previously quoted material, limiting quotation to no more than 10% of any one letter and, in most cases, no more than 10 words from any one letter. In the new September proofs (Exh. D to the Timberman affidavit), there remain between 200 and 300 words of direct quotation, representing something between 0.8% and 2.0% of the content of the copyrighted correspondence. Because the Princeton, Harvard, and Texas libraries refused permission to quote from their letters, Hamilton eliminated all direct quotations from letters available only at those libraries. He retained certain quotations from letters at Princeton that are also found in the Sublette bibliography.[1]

The September proofs use the letters as an important source to report Salinger's opinions, thoughts, feelings, and fantasies as a young man. A substantial percentage of the book consists of material learned by Hamilton from the letters.

By agreement with Salinger, defendants submitted the revised September page proofs to his attorneys on September 18, 1986. Salinger promptly brought suit, asserting that the biography

---

[1] On September 24, 1986, plaintiff's attorneys wrote to Sublette and his publisher demanding that they delete all quotation and paraphrasing of Salinger's unpublished works before distributing any further copies of the bibliography. Salinger Aff. ¶ 23, ex. N. Plaintiff's attorneys were advised by the Princeton library that Sublette had not obtained library permission to quote the letters.

infringes his copyrights and that he will be irreparably harmed if publication and distribution are allowed to proceed. On October 3, 1986, I granted a temporary restraining order to preserve the status quo. Defendants agreed to extend the TRO until today's date to permit discovery, submission of a hearing record, briefing and ruling on Salinger's motion for a preliminary injunction. For the reasons set forth below, that motion is now denied.[2]

Discussion

1. *The Scope of Copyright Protection.*

The first question to be considered is whether and to what extent Hamilton's book takes material from Salinger's letters that is protected by the copyright. Salinger contends the taking goes far beyond the 200-300 quoted words. He contends that lengthy portions of numerous letters are tracked and paraphrased in a manner that misappropriates his copyrighted expression. He argues that the material so taken constitutes the "heart" not only of his letters, but also of Hamilton's book. *Cf. Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 105 S.Ct. 2218, 2233-34, 85 L.Ed.2d 588 (1985).

Salinger is correct that copyright infringement is not limited to verbatim quotation. Paraphrase that reproduces the original author's protected expression also is a violation. *See, e.g., Donald v. Zack Meyer's T.V. Sales and Service*, 426 F.2d 1027, 1030 (5th Cir.1970); *Davis v. E.I. DuPont de Nemours & Co.*, 240 F.Supp. 612, 621 (S.D.N.Y. 1965).

On the other hand the copyright does not protect all of the material in an author's original work. The importance of free public dissemination of ideas and matters of historical fact dictates

---

[2] Although this lawsuit is directed against the May galleys as well as the new September galleys, the defendants have represented that there will be no further distribution of the text as it appeared in May. Accordingly, I have regarded the injunction motion as moot insofar as it may pertain to the earlier form of the text.

that they should not be subject to private ownership or control. It is therefore axiomatic that the copyright does not encompass facts or ideas. What is protected is the art, or craftsmanship—the author's particular manner of expression. *See, e.g., Reyher v. Children's Television Workshop*, 533 F.2d 87, 91 (2d Cir.1976) (*quoting* Chafee, *Reflections on the Law of Copyright*, 45 Colum.L.Rev. 503, 513 (1945)); *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir.1960).

To make a determination of the extent of taking of copyrighted material, it is therefore necessary to examine closely the comparison of the copyrighted and the accused passages, not only to determine the extent and nature of similarity but also to ascertain whether what was taken is in the protected category or in the unprotected realms of fact and idea. *See, e.g., Werlin v. Reader's Digest Ass'n*, 528 F.Supp. 451, 462 (S.D.N.Y.1981). To facilitate this test, plaintiff has submitted at the court's request a compilation of 59 instances of comparative texts representing "as complete a picture as possible" of the alleged infringements. (The list, set forth as Exhibit A to the Coleman affidavit of October 16, 1986, is hereafter referred to as "Exhibit A".)

The comparison reveals that the vast majority of the material taken by Hamilton from the letters is not copyright protected. Salinger's letters are full of information about his life upon which the biographer has drawn. Such information is not protected by the copyright. Unprotected information of this nature includes far more than the where, when and with whom. Information as to the subject's thoughts and feelings is vital historical fact for the biographer and belongs in the unprotected categories, so long as the biographer does not overstep permissible limits by taking the author's craftsmanship. *See, e.g., Meeropol v. Nizer*, 417 F.Supp. 1201, 1211 (S.D.N.Y.1976), *rev'd on other grounds*, 560 F.2d 1061 (2d Cir.1977), *cert. denied*, 434 U.S. 1013, 98 S.Ct. 727, 54 L.Ed.2d 756 (1978); *see also Harper & Row, Publishers, Inc. v. Nation Enterprises*, 723 F.2d 195, 105 & n. 14 (2d Cir.1983), *rev'd on other grounds*,

471 U.S. 539, 105 S.Ct. 2218, 85 L.Ed.2d 588 (1985). Furthermore, the ideas revealed in a copyrighted work are not protected by the copyright.

For the biographer to report in his own words Salinger's ideas drawn from the letters or the fact that Salinger was depressed, elated, or angry, does not violate the copyright. His resentment against literary critics who, having never taken the risks or braved the pains and difficulties of creative writing, presume to pass judgment on serious authors (Letter No. 34) may be drawn from his letter without infringement, both as an idea and as a historical fact. Likewise, his evaluations of Hemingway (Nos. 37 & 38); his difficulty sustaining his infatuations with girls (Nos. 23 & 32); his determination at one point to write for Hollywood and riches (No. 26); his reticence to yield any of his freedom by accepting an advance (No. 28), etc.

I find that virtually every passage taken by Hamilton from the 59 letters consists primarily of a report of such historical fact (or of an idea) which is not protected by the copyright.

That does not end the inquiry. As noted, the license to report historical fact and idea found in copyrighted material does not carry with it the right to employ the originator's particular words or manner of expression; these are protected by the copyright. *See Nation*, 105 S.Ct. at 2232-33; *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 980 (2d Cir.1980), *cert. denied*, 449 U.S. 841, 101 S.Ct. 121, 66 L.Ed.2d 49 (1980). Whether there is infringement does not necessarily turn on whether there is direct quotation. If, for example, the original work quotes a third person (as where Salinger in Letter No. 7 quotes from a rejection letter he received in 1940 from *Esquire*), that quotation is a historical fact, it is not an original creation of the copyright holder, and it may be requoted without infringement. Also, the copyright applies only to original creation and not to cliche or ordinary unoriginal combinations of words. *See* W. Patry, *Latman's The Copyright Law* 23-24 (1986). Although Salinger's letters are predictably vibrant and full of originality of image, metaphor and expression, even he occasionally (albeit

rarely) employs a cliche or a word-combination that is so ordinary that it does not qualify for the copyright law's protection.

Thus where Salinger describes himself as one who "could never even put a Tinker-Toy together" (No. 21), or states that he "miss[es] [his] little typewriter terribly" (No. 17), or describes a work as "the religious book of the century" (No. 52), Hamilton's quotation of those words does not implicate the copyright.

On the other hand, the author's own original image, choice of words, and turn of phrase are protected and there will be infringement (absent justification) when they are appropriated whether by direct quotation or by paraphrase.

A few examples follow (all references to Hamilton's text are to a xerox copy of proofs submitted as defendants' Exh. D) (emphases supplied):

Salinger	Hamilton
Describing Wendell Willkie as a phoney, adds that he looks "like a guy who makes his wife keep a scrapbook for him." (No. 11)	"the sort of fellow who makes his wife keep an album of his press cuttings." (p. 47)
As to why he writes under J.D., complains that Jerome is a lousy name. "It always sounds so much like Jerome . . . . (No. 12)	" . . . Jerome was such a dreadful name: however you said it, Jerome always came out sounding like Jerome." (p. 48)
The men in my tent—though a damn nice bunch—are always eating oranges or listening to quiz programs . . . . (No. 18)	(Substantially quoted on p. 57.)

About a novel he has wanted to write since he was 17, "until I can get icy about the whole thing . . . , I'm not going to touch it. I'm getting colder and colder on it. Won't be long. (No. 29)

"Salinger wants to feel like ice about this book . . . . And he is prepared to wait. The iciness is deepening, and he feels that he will soon be cold enough to make a start." (pp. 67-68)

"[E]verybody over here who's ever taught Senior English for a couple of semesters, or worked for a good upholsterer, has con sidered himself qualified to collect and edit a short story anthology." (No. 57)

"[A]nybody who has 'ever taught Senior English,' however briefly, or been employed by 'a good upholsterer' has reckoned himself to have the perfect skills for putting together an anthology of shorter fiction." (p. 157)

Describing his life as a soldier in the counter-intelligence corps in Germany after its fall, he writes that he and his new wife have bought a sportscar, and that his big black dog Benny "rides on the running board, pointing out Nazis for me to arrest." (No. 40)

"The couple have . . . a large dog called Benny. Benny rides with them in the car and lets them know if he spots any arrestable Nazis." (p. 91)

[See also in No. 39 and at Hamilton, p. 89-90, the reference to being publicly cremated in front of the offices of the Saturday Evening Post in retribution for "treasonous" thoughts; Salinger's bitter fantasy of the domesticity of his once beloved Oona O'Neill with her new aged husband Charlie Chaplin (No. 24 and Hamilton, p. 65); "If [the liberating Americans] had stood on top of the jeep and taken a leak, Paris would have said, 'Ah, the darling Americans! What a charming custom!' " (No. 36, Hamilton p. 82).]

As to each of these passages, the biographer has gone beyond the permissible report of a historical fact or an idea and has reproduced an image, literary device, metaphor or choice of words that is protected by the copyright. In total I have found approximately 30 letters from which Hamilton has taken, either by brief quotation or paraphrase, a few words of copyright protected material. Unless excused under the doctrine of fair use, or found to be too insignificant in net effect to justify a cause of action, these represent instances of infringement and a possible basis for injunction.

2. *Fair Use.*

Despite Hamilton's use of copyright protected material from the letters, his book is not guilty of infringing if those quotations and paraphrases are found to be "fair use." " 'Fair use' is a 'privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent . . . . ' " *Rosemont Enterprises v. Random House, Inc.*, 366 F.2d 303, 306 (2d Cir.1966) (*quoting* Ball, *Copyright and Literary Property* 260 (1944)). It is described as an "equitable rule of reason." House Report No. 94-1476, 94th Cong., 2d Sess. 66, 1976 U.S. Code Cong. & Ad.News 5659, 5680 (hereinafter "House Report"). The rule is codified at 17 U.S.C. § 107 (1982):

> [T]he fair use of a copyrighted work, including such use by reproduction in copies . . . for purposes such as criticism, comment, news reporting, . . . scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

> (4) the effect of the use upon the potential market for or value of the copyrighted work.

These factors were distilled from the common law and were not intended as exclusive. Instead, they are the focus of a factual inquiry to determine whether the particular use of copyrighted material should be considered fair and lawful.[3]

A. *Is the Fair Use doctrine applicable to unpublished work?* Plaintiff contends that the privilege of fair use has no application to unpublished work. Common law traditionally protected the author's decision "whether and in what form to release his work," *Nation*, 105 S.Ct. at 2227, including unpublished letters. *See, e.g., Birnbaum v. United States*, 588 F.2d 319, 326 (2d Cir.1978). A leading New York case defined common-law copyright as

> an author's proprietary interest in his literary or artistic creations before they have been made generally available to the public. It enables the author to exercise control over the first publication of his work or to prevent publication entirely . . . .

Estate of Hemingway v. Random House, Inc., 23 N.Y.2d 341, 345-46, 296 N.Y.S.2d 771, 776 (1968).

---

[3] The House Report states:

> The bill endorses the purpose and general scope of the judicial doctrine of fair use, but there is no disposition to freeze the doctrine in the statute, especially during a period of rapid technological change. Beyond a very broad statutory explanation of what fair use is and some of the criteria applicable to it, the courts must be free to adapt the doctrine to particular situations on a case-by-case basis. Section 107 is intended to restate the present judicial doctrine of fair use, not to change, narrow, or enlarge it in any way.

House Report at 66, U.S. Code Cong. & Ad.News at 5659, 5680. *See also* S.Rep. 94-473, 94th Cong., 1st Sess. 62 (1975) (hereinafter "Senate Report").

In the Copyright Revision Act of 1976, Congress extended federal protection to the right of first publication. *See* 17 U.S.C. § 106 (1982). The privilege implicates both the author's "personal interest in creative control" and "his property interest in exploitation of prepublication rights." *Nation*, 105 S.Ct. at 2228. Although "common-law copyright was often enlisted in the service of personal privacy," *id.*, Congress was specifically concerned that the copyright owner "have the right to control the first public distribution of an authorized copy . . . of his work." House Report at 62, 1976 U.S.Code Cong. & Ad.News at 5675.

In the *Nation* case, the Supreme Court held that *"[u]nder ordinary circumstances,* the author's right to control the first public appearance of his undisseminated expression will outweigh a claim of fair use." 105 S.Ct. at 2228 (emphasis added). "[T]he scope of fair use is narrower with respect to unpublished works." *Id.* at 2232. Thus, "the unpublished nature of a work is '[a] key, *though not necessarily determinitive, factor'* tending to negate a defense of fair use." *Id.* at 2227-28 (*quoting* Senate Report at 64 (emphasis added by this court). *See also* Note, *Copyright and Privacy Protection of Unpublished Works – The Author's Dilemma*, 13 Colum.J.L. & Soc.Probs. 351, 377 (1977). The Court, however, stressed the tailoring of fair use analysis to the particular case. *See* 105 S.Ct. at 2227. It neither stated nor implied a categorical rule barring fair use of unpublished works. *See* Nimmer § 13.05[A][2], at 13-74 to 13-77. *But see Nation*, 105 S.Ct. at 2249 (Brennan, J., dissenting); *Sinkler v. Goldsmith*, 623 F.Supp. 727, 732 (D.Ariz.1985). Indeed, the Court proceeded to evaluate the Nation's use of Gerald Ford's unpublished manuscript in terms of all the statutory fair use factors.

Few recent decisions have involved unpublished works. Citing the *Nation* opinion, the *Sinkler* court granted summary judgment in favor of the copyright counterclaimant because the letters in issue had not previously been published or widely disseminated. The Arizona District Court held that the fair use doctrine "generally applies to materials already released by an author for public consumption." 623 F.Supp. at 732. The

Second Circuit, on the other hand, earlier held a newspaper's publishing of a copyrighted letter to the editor to be a fair use. *Diamond v. Am-Law Pub. Corp.*, 745 F.2d 142 (2d Cir.1982). The *Diamond* court did not even regard the unpublished nature of the letter as a factor, perhaps because the plaintiff desired publication and complained merely of the paper's editing of his letter.

Courts have also applied the fair use doctrine to cases involving unpublished architectural plans and medical school admissions test questions (although ruling in these cases against defendants). *Schuchart & Assocs. v. Solo Serve Corp.*, 220 U.S.P.Q. 170, 180 (W.D.Tex.1983) (scope of fair use of the plans narrower than with respect to published works, even though the plaintiff had not kept the plans confidential); *Aitkin, Hazen, Hoffman, Miller, P.C. v. Empire Constr. Co.*, 542 F.Supp. 252-260 (D.Ne.1982) (court ignored the unpublished nature of the plans, but emphasized that developer had destroyed the copyright owner's only potential market for its work by exploiting an exact copy of the plans for a particular project); *Association of American Medical Colleges v. Mikaelian*,571 F.Supp. 144, 151-53 (E.D.Pa.1983) (test questions were developed under strict security and commercial exploitation of the questions to prepare students for taking the test destroyed their value to the copyright holder); *aff'd without opinion*, 734 F.2d 3 (3d Cir.1981).

More on point are the opinions of New York state courts in a suit to enjoin the publication of a biography of Ernest Hemingway. The writer's wife and estate invoked a common-law copyright in Hemingway's unpublished letters. First, in denying the application for a preliminary injunction, the court suggested that the absence of direct quotation from the letters rendered any copyright infringement de minimis. *Estate of Hemingway v. Random House, Inc.*, 49 Misc.2d 726, 268 N.Y.S.2d 531, 536 (N.Y.Co.), *aff'd without opinion*, 25 A.D.2d 719, 269 N.Y.S.2d 366 (1st Dep't 1966). On the defendant's later motion for summary judgment, however, the court considered the question of fair use. In addition to reiterating that defendants

had not quoted verbatim, the court emphasized the biographical purpose for using the letters, the nature of plaintiffs' literary property, and the absence of any harm to the market for the letters. 53 Misc.2d 462, 279 N.Y.S.2d 51, 57-58 (N.Y.Co.), *aff'd without opinion*, 29 A.D.2d 633, 285 N.Y.S.2d 568 (1st Dep't 1977), *aff'd on other grounds*, 23 N.Y.2d 341, 296 N.Y.S.2d 771, 244 N.E.2d 341 (1968).[4] Plaintiff here argues, citing W. Patry, *The Fair Use Privilege in Copyright Law* 440-41 (1985), that the *Hemingway* court found only that the copying was de minimis. In dismissing the common-law copyright claim, however, the court considered all four of the fair use factors now enumerated in 17 U.S.C. § 107, of which the amount and substantiality of the use is one. I read it as a finding of fair use, as well as of de minimis.

In my view, plaintiff's argument that there may be no fair use of an unpublished work is exaggerated and unreasonable. Of course, fair use protection should be sparingly accorded to quotation from unpublished work lest such use effectively

---

[4] The New York Court of Appeals asserted in dictum that there is a freedom not to speak publicly that parallels the common-law copyright in written materials. The Court nonetheless indicated that there is no categorial distinction between published and unpublished works with respect to fair use:

> The indispensable right of the press to report on what people have *done*, or on what has *happened to* them or on what they have *said in public* does not necessarily imply an UNBOUNDED freedom to publish whatever they may have *said in private conversation*, any more than it implies a freedom to copy and publish what people may have put down in *private writings*.
>
> Copyright, BOTH common-law and statutory, rests on the assumption that there are forms of expression, limited in kind, to be sure, which should not be divulged to the public without the consent of their author. The purpose, far from being restrictive, is to encourage and protect intellectual labor.

Id. at 347-48; 296 N.Y.S.2d at 778, 244 N.E.2d at 348 (emphasis in original) (boldface added) (citations omitted).

deprive the creator of his right to exercise reasonable control over his own artistic reputation and over the initial presentation of his work. However, where the proposed use is of such character that it would not affect those interests of the copyright holder, no good reason can justify so extreme a rule as would absolutely bar the fair use of unpublished matter. As the name of the rule implies, it looks to the *fairness* of the secondary reference. If this *unfairly* interferes with the creator's reasonable enjoyment of his right of literary property, it will be enjoined. If, on the other hand, the secondary use is fair, giving due regard for the creator's right to control the first publication, it will be permitted. That the work is unpublished is an important factor, but it is not the end of the inquiry.

I agree with Salinger's counsel that the right of initial publication is entitled to preservation where it is exercised for the purpose of withholding publication, as well as where it is exercised to control the manner of initial presentation. The copyright concerns itself not only with assuring the creator of original work of the right to reap the profits. It concerns itself also with the establishment and maintenance of artistic reputation. *See Schnapper v. Foley*, 667 F.2d 102, 114 n. 5 (D.C. Cir.1981) (citing Note, *An Author's Artistic Reputation Under the Copyright Act of 1976*, 92 Harv.L.Rev. 1490 (1979)), *cert. denied*, 455 U.S. 948, 102 S.Ct. 1448, 71 L.Ed.2d 661 (1982). In this sense the copyright shares something in common with trademark in that each serves to identify to the public the products coming from a particular source. By the act of publication under his name, the creator risks his reputation in the work. By the same token, if a writer believes that his draft is not up to snuff and does not with to subscribe to it, his copyright permits him to suppress its publication. *See Hemingway*, 296 N.Y.S.2d at 776, 244 N.E.2d at 346. He may not, of course, suppress publication by others of the ideas or the information contained in it, as these are not covered by the copyright. But he may bar unauthorized publication of his unpublished work, even if it is his hope to keep it from being published forever. Thus my finding in Hamilton's favor on the subject of fair use is not based on a perception that, as defense counsel have

argued, the copyright holder may not seek to enforce his right of first publication unless he intends to make such publication.

B. *Is this Fair Use?*

Upon full consideration of the factors that bear on the question of fair use, it is my view that defendants have made a sufficiently powerful showing to overcome plaintiff's claims for an injunction. The reasons that support this finding are: Hamilton's use of Salinger's copyrighted material is minimal and insubstantial; it does not exploit or appropriate the literary value of Salinger's letters; it does not diminish the commercial value of Salinger's letters for future publication; it does not impair Salinger's control over first publication of his copyrighted letters or interfere with his exercise of control over his artistic reputation. The biographical purpose of Hamilton's book and of the adopted passages are quite distinct from the interests protected by Salinger's copyright. Finally, although both Hamilton and Random House no doubt hope to realize profit from the sales of the book, it is a serious, carefully researched biography of an important literary figure (of whom little is known); its publication is of social and educational value.

(i) *Extent of Appropriation.* The "amount and substantiality" of the use of the copyrighted work is a factor specified by the statute. As noted above, Hamilton's main drawings from Salinger's letters are of biographical material that is not protected by the copyright. If one looks at the totality of the material drawn from the letters, it is no doubt true, as plaintiff argues, that Hamilton has taken important matter from them. But for this inquiry we must distinguish between what is copyright protected and what is not. Although a large amount of *information* is taken from the letters, and is of vital importance to the book, the information is not protected by the copyright.

The appropriate quantitative and qualitative analysis is directed to Hamilton's taking of copyright protected matter. This is limited to about 30 instances of the use of a word

or a phrase or an image. These instances rarely involve more than a few words of Salinger's copyright protected material. In the rarest case, a complete sentence is taken (see No. 3). These passages are not the heart of Salinger's letters, nor of Hamilton's book. The taking of copyright protected matter is insignificant.

There can be no doubt these passages improve Hamilton's book. It is, after all, the biography of a powerful writer. The history is more lively and true to the extent that it uses Salinger's own sharp images in preference to a neutered description of his thoughts or feelings. It certainly tells more about Salinger to read his acid quip that anyone who has worked for "a good upholsterer" considers himself qualified to edit a short story anthology (No. 57), than to be told that he resented the presumption of unqualified editors.

Hamilton's testimony suggests he agrees that he did not improve his book by eliminating and writing around most of the quoted matter that appeared in the May galleys. But what he did accomplish was to reduce from a large number to fewer than 30 the instances of use of copyrighted expression. He has thus very substantially improved his entitlement to claim fair use.

The few and brief instances that remain add color and accuracy of detail to the portrait of Salinger. They do not give the reader the sense that she has read Salinger's letters. They do not give the reader a basis to evaluate Salinger's skills as a writer. The excerpting of these details does not interfere with Salinger's control over initial publication.

(ii) *Difference of Purpose and Effect on Market.* Hamilton's work is biographical; it is neither a presentation, nor even a critique of Salinger's work. The Salinger letters serve Hamilton primarily as a source of biographical information and detail and not as a reservoir of Salinger literature to be revealed in Hamilton's book. A biographical subject's letters can play an important role in filling out the history or portrait, the internal life of the subject – his thoughts, opinions, moods and feelings.

But the use of letters as a source poses a dilemma for the biographer. To the extent he quotes (or closely paraphrases), he risks a finding of infringement and an injunction effectively destroying his biographical work. To the extent he departs from the words of the letters, he distorts, sacrificing both accuracy and vividness of description.

Courts have thus recognized the legitimacy of use of excerpts from copyrighted letters in service of a biographical portrait, *see, e.g., Hemingway*, 279 N.Y.S.2d at 58; *Meeropol*, 417 F.Supp. at 1211-12, but at the same time, they have warned against going too far. *Meeropol*, 560 F.2d at 1069-71 (reversing grant of summary judgment to defendants because of factual uncertainties with respect to the substantiality of the use, the purpose of copying entire letters and long passages verbatim, and the effect of the book's publication on the future market for the letters). A biographical purpose will not excuse "extensive verbatim copying or paraphrasing" of copyrighted matter. *Rosemont*, 366 F.2d at 310; *see also Iowa State U. Research Foundation, Inc. v. American Broadcasting Cos.*, 621 F.2d 57, 60-61 (2d Cir.1980).

George Washington's copyrighted letters were found by Justice Story in 1841 to form a substantial part of an infringing biography. *Folsom v. Marsh*, 9 Fed.Cas. No. 4901 p. 342 (C.C.D.Mass.). Justice Story held that there could be no fair use of letters in a historical work if "the value of the original is sensibly diminished or the labors of the original author are substantially appropriated." Letters "may be inserted as a sort of distinct and mosaic work, into the general texture of the second work, and constitute the peculiar excellence thereof, and then it may be a clear piracy." *Id.* at 348, quoted in *Meeropol*, 560 F.2d at 1070. Justice Story added, however,

> It is not a case where abbreviated or select passages are taken from particular letters; but the entire letters are taken, and those of most interest and value to the public. . . . If it had been the case of a fair and bona fide abridgement of the work of the plaintiffs, it might have been admitted of a very different consideration.

Id. at 349, quoted in *Meeropol*, 417 F.Supp. at 1212.

What is therefore required is careful case-specific analysis whether, on all the factors, the biographer's use of copyrighted expression has been fair and reasonable or whether it has trespassed excessively on the copyright. *See Meeropol*, 560 F.2d at 1069-71. Such examination demonstrates the reasonable scope and purpose of Hamilton's appropriations.

How copying affects the marketability of the copyrighted work was described in *Nation*, 105 S.Ct. at 2234, (*citing* 3 Nimmer § 13.05(A)(4), now at 13-79) as "undoubtedly the single most important element of fair use." This issue is not merely a matter of quantifying damages. *See* 3 Nimmer § 13.05(A)(4) at 13-79 n. 35.1a. The creator's right to the publication of his copyrighted material involves many factors (including artistic reputation and control of first presentation) that are not wholly compensable by an award of damages. Also, the emphasis is on marketability and commercial value, rather than actual market. Thus, Salinger's intention not to publish does not moot the issue.

On the other hand, the marketability to be considered is the marketability of what the copyright protects, not of the unprotected matter to be found in the copyrighted work. And the issue is whether any effect on marketability of the copyrighted work was brought about *by the use of copyrighted matter* rather than by other factors. *See Nation*, 105 S.Ct., at 2252-53 (Brennan, J., dissenting). Thus, if a copyrighted author sues a book reviewer for infringement and the reviewer defends on grounds of fair use, the negative effect on the marketability of the book that results from the reviewer's low opinion of it is not the market effect of which the rule speaks. What the rule concerns is negative effect on the marketability of the copyrighted work resulting from the sense on the part of the readership that they have already read it in the other publication.

Readers may be drawn to purchase a publication of Salinger's letters for at least two distinct reasons. One reason is the reader's

desire to read Salinger's work. A second reason may be the reader's interest in acquiring information about Salinger's early life.

The copyright law and the question of fair use concern themselves with the readers in the first category. If Hamilton's book revealed the literary content of Salinger's letters to such degree that any appreciable number of potential purchasers in the first category would be dissuaded from buying the letters, feeling that they had already read them in Hamilton, that would argue strongly against a finding of fair use. In my view, however, Hamilton's use of Salinger's copyright protected matter is so slight that it in no way diminishes the marketability of Salinger's letters among readers of Salinger.

There may be an effect on the readership motivated only by the second desire. A person drawn to purchase Salinger's letters only by the desire to learn more about Salinger's life might find that her biographical interest had been satisfied by the information conveyed in Hamilton. This readership may indeed be affected, but only by Hamilton's report of unprotected, historical facts, not by his use of copyright protected expression.

I conclude that Hamilton's limited use of copyright protected passages from Salinger's letters would have no effect on the marketability of the letters, as contemplated by the fair use statute.

(iii) *Commercial v. Educational.* "[F]air use . . . for such purposes as criticism, comment, news reporting . . . scholarship or research is not an infringement. . . . [T]he factors to be considered shall include . . . whether such use is of a commercial nature or is for nonprofit educational purposes. . . ." 17 U.S.C. § 107 (1982). In so saying, the statute somewhat unrealistically paints the world into two corners – the venal commercial and the altruistic instructive. In fact, publishers of educational textbooks are as profit-motivated as publishers of scandal-mongering tabloid newspapers. And a serious scholar should not be despised and denied the law's protection because he hopes to earn a living through his scholarship. The protection of the

statute should not turn on sackcloth and missionary zeal. It rather directs the court to make an appraisal of social usefulness and of commercial fair play. Notwithstanding the hopes undoubtedly shared by Hamilton and his publisher for the best seller list and its monetary rewards, this factor favors the defendants. *Cf. Maxtone Graham v. Burtchaell*, 803 F.2d 1253, 1262 (2d Cir. 1986); *Consumers Union v. General Signal Corp.*, 724 F.2d 1044, 1049 (2d Cir. 1983), *cert. denied*, 469 U.S. 823, 105 S.Ct. 100, 83 L.Ed.2d 45 (1984); *Rosemont*, 366 F.2d at 307.

As an extraordinarily talented and fascinating author, Salinger is a figure of great public interest. His novels are among the most widely admired and sold of the last quarter century. Because of his firmly maintained wish for privacy, little is known of him. Although his desire for privacy is surely entitled to respect, as a legal matter it does not override a lawful undertaking to write about him using legally available resources.

Hamilton's book cannot be dismissed as an act of commercial voyeurism or snooping into a private being's private life for commercial gain. It is a serious, well-researched history of a man who through his own literary accomplishments has become a figure of enormous public interest. This favors a finding of fair use.

The *Nation*, on which plaintiff relies heavily, is easily distinguished. There the defendant had deprived the copyright licensee of commercial value by a gun-jumping publication that pirated "the heart" of the copyrighted work. The market for the copyrighted work was seriously affected. Those factors played a powerful role in the Supreme Court's decision. *See* 105 S.Ct. at 2232-35. None of them is present here.

(iv) *Equitable Factors*. Salinger argues further that unfair conduct on Hamilton's part in disregarding the library agreements should disqualify him from receiving the benefits of the equitable fair use doctrine. This is the only point on which I find Hamilton's position less than wholly persuasive. He

contends his conduct was justified by his understanding that the requirement of permission applied only to infringement of copyright and that, because of the fair use doctrine, the material he took from the letters involved no infringement. As discussed below, I am inclined to agree with his understanding of the library agreements. And had the initial draft of his book been similar to its present modified form, his second point would be more convincing. Given the extensive quotation from the letters that appeared in the May galleys, Hamilton was certainly giving himself a generous benefit of the doubt in concluding that the library agreements did not call for permissions.

The issue does not easily admit of a clear finding. But even assuming an ultimate conclusion that Hamilton was cavalier about the need for permissions, that would not justify enjoining his book in its present form.

In my view, the use of copyrighted matter in the present form of the book is so minimal and the case favoring a finding of fair use is so convincing that an injunction cannot be justified, even if it were found that Hamilton showed more solicitude for his own interests than for Salinger's in dealing with the library agreements.

3. *De Minimis*

If there were some impediment to a finding of fair use – such as, for example, plaintiff's extreme contention that fair use has no application to unpublished work, it would be necessary to consider whether the extent of infringement was too insignificant to justify enjoining Hamilton's biography. Enjoining publication of a book is a serious matter. With all respect for the rights of a copyright owner, a publication should not be enjoined where the degree of infringement is trifling and inconsequential. *See Rosemont*, 366 F.2d at 306, 311; *Belushi v. Woodward*, 598 F.Supp. 36, 37-38 (D.D.C.1984); *Estate of Hemingway*, 268 N.Y.S.2d at 534, 536. Because I find fair use so clearly established, I need not reach a finding on whether, absent

fair use protection, the infringement would be so insignificant as to warrant the denial of even a preliminary injunction. In all likelihood, Hamilton would prevail on this issue.

Hamilton's use of copyrighted expression is so minimal, it is difficult to perceive any harm to Salinger. The wound he has suffered is not from infringement of his copyright but from the publication of a biography that trespasses on his wish for privacy. The copyright law does not give him protection against that form of injury.

4. *Lanham Act Claim*

Salinger also alleges that defendants have violated § 43(a) of the Lanham Act. 15 U.S.C. § 1125(a) (1982). He argues that the biography's quotations and paraphrases, often introduced by such words as "Salinger said," are likely to mislead the reading public into believing that Salinger was interviewed for and sponsored the biography.

The contention is without merit. The reader could not reasonably infer that the biography had benefitted from interviews of Salinger. In the first place, Salinger's present and long-standing reclusive unavailability to the world is one of its dominant themes. Hamilton makes no pretense of having interviewed Salinger. In the epilogue, for example, Hamilton attributes to a reliable, but undisclosed, source that Salinger, since withdrawing all his works from publication, has written two full-length manuscripts which he keeps locked in a safe (pp. 194-95). In the course of the narrative, Hamilton recounts an incident in 1953 in which Salinger, having moved to Cornish, New Hampshire and befriended the local high school kids, agreed to give two of the girls an interview for the high school page of the local newspaper. Hamilton reports Salinger's sense of betrayal when that interview appeared as a scoop on the front page of the local paper. Hamilton adds, "It was the last interview Salinger has ever given to anyone." (pp. 138-39.)

Also, under § 43(a), Salinger contends that Hamilton has presented him misleadingly by distorting paraphrase. This is a Catch-22 claim: If Hamilton used Salinger's words, he violated

the copyright act; if he avoided using Salinger's words, he violated the Lanham Act. There is, however, no showing of distortions that would give rise to a Lanham Act claim. *Cf. Gilliam v. American Broadcasting Cos.*, 538 F.2d 14, 23-25 (2d Cir.1976).

5. *Third-Party Beneficiary Contract Claim*

Salinger also alleges that Hamilton violated his rights as a third-party beneficiary under agreements Hamilton made with libraries to gain access to his correspondence. This claim is independent of the copyright contentions. In my view, however, the intention and scope of those agreements are to protect the literary property interests of the owner and not to give the copyright owner an arbitrary power to block legitimate non-infringing use.

Although a few words considered out of context may seem to imply a more extreme purpose, the full text of the library agreements (including in the case of Texas the accompanying "Information for Manuscript Readers") makes clear that their purpose is to safeguard literary property rights.[5] Although the precise text of the Harvard and Texas agreements seem to go farther than Princeton in restricting the researcher from "quot[ing]" (Texas) or publishing "any excerpt" (Harvard), this restriction should be understood as applying only to quotations and excerpts *that infringe copyright*. To read them as absolutely forbidding any quotation, no matter how limited or appropriate, would severely inhibit proper, lawful scholarly use and place an arbitrary power in the hands of the copyright owner going far beyond the protection provided by law. Often, for example, an idea cannot be reported accurately without some quotation.

---

[5] Indeed, the libraries are concerned that they not be exposed to copyright claims against them. Thus the Princeton agreement requires that the researcher "assume all responsibility for any infringement by [him] of the literary property rights held by others in the material requested." Salinger Aff., ex. E. Similarly, the Harvard application provides that he "agree to indemnify and hold harmless the University, its officers, employees and agents from and against all claims made by any person asserting that he is an owner of the copyright." *Id.* ex. G.

To require the historian or commentator to paraphrase would simply cause inaccuracy and misunderstanding, impeding scholarship. I believe it would be unreasonable to construe the library agreements as so far-reaching. In any event, the new September proofs have eliminated all direct quotation from the Harvard and Texas letters.[6]

In view of my understanding of the scope of these agreements, I need not reach the defendants' contention that Sublette's prior publication of quotes from the Princeton library freed those materials for Hamilton's use. In any event, the Princeton agreement does not expressly forbid "quotation."

6. *The Standards for Preliminary Injunction*

A preliminary injunction may be granted in this Circuit only upon a showing of irreparable harm and either (1) likelihood of succcess on the merits, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation, together with a balance of hardships tipping decidedly toward the party requesting the preliminary relief. *Jackson Dairy, Inc. v. H.P. Hood & Sons*, 596 F.2d 70, 72 (2d Cir.1979); *Dallas Cowboys Cheerleaders, Inc. v. Pussycat Cinema, Ltd.*, 604 F.2d 200, 204-05 (2d Cir.1979). The standard for preliminary relief is less demanding than for a permanent injunction. Nonetheless, Salinger has not made the showing required for a preliminary injunction. I find for the defendants on every issue.

Salinger has demonstrated no likelihood of success. To the contrary, I believe the defendants have so far shown their likelihood of success that it is doubtful whether plaintiff prevails on the first factor of the second branch – a showing of fair grounds for litigation. I need not resolve that issue, however,

---

[6] Salinger also contends that Hamilton has violated the further conditions set forth in a letter to Hamilton from Gerald Gunther, the custodian of the Hand papers for the Harvard library. The submissions, however, fail to establish that Gunther's letter constituted an additional contract, supplementing the Harvard library agreement that it refers to. And even if it did, it is the sense of Gunther's letter that "actual quotation" would require a further permission. The September proofs do not quote from those letters.

because plaintiff has shown neither irreparable harm nor the balance of hardships tipping decidedly in his direction.

Hamilton's appropriations of copyrighted expressions are too minimal to subject Salinger to any serious harm. There is no substantial revelation of the copyright protected aspects of his letters. There is no adverse impact on their market value as literature by Salinger.

The adverse impact on defendants from a preliminary injunction, on the other hand, would be substantial. *Cf. Belushi*, 598 F.Supp. at 37. The book is in print awaiting distribution. The lengthy delays that might result from waiting for appeals and for final trial on the merits might seriously impair the marketability of the book. First publication licenses optioned to *The New York Times Sunday Magazine* would be imperiled. The balance of hardships favors the defendants.

In addition, both sides acknowledge there is little or no significant evidence to be added at final trial that might justify a temporary stay awaiting the collection of the full evidence.

Upon all the factors, the application for a preliminary injunction is denied.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 657—August Term, 1986

(Petition for rehearing
submitted: February 12, 1987 Decided: May 4, 1987)

Docket No. 86-7957

JEROME D. SALINGER a/k/a J.D. SALINGER,
Plaintiff-Appellant,

— v. —

RANDOM HOUSE, INC. and IAN HAMILTON,
Defendants-Appellees.

Before:

NEWMAN and MINER,
Circuit Judges.

PER CURIAM:

Following our decision of January 29, 1987, 811 F.2d 90, appellees have petitioned for rehearing and, in sup-

port of their petition, have moved to supplement the record on appeal. They wish to include Judge Leval's marked copy of plaintiff's trial exhibit that sets forth those passages of Salinger's letters alleged to be infringed and compares them with the allegedly infringing passages of Hamilton's biography. Judge Leval color-coded his copy, meticulously marking the passages in five colors to reflect his view as to whether the passage contained an infringing quotation, an infringing paraphrase, a non-infringing quotation (because Salinger was quoting someone else or because the quoted words were a cliche), a non-infringing report of historical facts, or a non-infringing report of ideas. Judge Leval first disclosed his marked copy of the exhibit to the parties at a chambers conference on February 18, 1987, and that day ordered it made a part of the record in the District Court.

However, on March 9, 1987, Judge Leval vacated his February 18 order, expressing doubt as to his jurisdiction to enter the order during the pendency of the appeal from the denial of the preliminary injunction. To eliminate any basis for such doubt, we issued our mandate on April 1 remanding the case to the District Court for the limited purpose of deciding whether to add the Judge's marked copy of the exhibit to the trial record. By order dated April 23, Judge Leval reinstated his February 18 ruling. Pursuant to our April 1 ruling, the mandate has been recalled following Judge Leval's ruling, and the issue of supplementing the appellate record is now properly before us.

We have authority to supplement the record on appeal, Fed. R. App. P. 10(e), even at this late stage of the appellate process, *see American Chemical Paint Co. v. Dow Chemical Co.*, 164 F.2d 208, 209 (6th Cir. 1947), and

have concluded that we should do so in this instance. The marked exhibit clarifies our understanding of the process by which the District Judge reached the decision challenged on appeal.

Having examined the marked exhibit, we can eliminate the uncertainty we previously expressed as to whether Judge Leval had considered those passages of Salinger's letters that Hamilton's biography had closely paraphrased. We can now be certain that such passages were considered, a matter we had been willing to assume on our initial consideration of the appeal. *See* 811 F.2d at 98.

Nevertheless, we see no reason for altering our conclusion that the biography, in its present form, infringes Salinger's copyright in his letters. Indeed, the marked exhibit reenforces our conclusion that the District Judge has, in some instances, misapplied the governing standards. Now that we can identify precisely those passages that the District Judge deemed to be infringing and non-infringing, it is evident that some passages containing facts and ideas were not deemed infringing, even though those passages impermissibly took the expressive content of Salinger's letters by copying the author's "association, presentation, and combination of the ideas and thought which go to make up [his] literary composition." *Nutt v. National Institute Inc. for the Improvement of Memory*, 31 F.2d 236, 237 (2d Cir. 1929).

The motion to supplement the record is granted. The petition for rehearing is denied.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

JEROME D. SALINGER, a/k/a J.D. SALINGER,

Plaintiff,

86 Civ. 7574 (

— against —

RANDOM HOUSE, INC. and IAN HAMILTON,

Defendants.

PRELIMINARY INJUNCTION

This cause having come on to be heard on plaintiff's application, by Order to Show Cause, for a preliminary injunction served and filed October 3, 1986, against the publication by defendants of a certain biography of the plaintiff; the Court having considered the Record submitted thereupon and having issued an Opinion and Order dated November 5, 1986; and plaintiff having appealed therefrom; and the United States Court of Appeals for the Second Circuit, by Opinion of the Honorable Jon O. Newman, Circuit Judge, dated and filed January 29, 1987, having made findings of fact and conclusions of law, and having reversed and remanded this Court's Opinion and Order with directions to this Court to issue a preliminary injunction barring publication of the biography in its present form, it is

ORDERED, that defendants Ian Hamilton and Random House, Inc. and all those acting under their direction or pursuant to their control and/or under license or authority from them, be and they hereby are preliminarily enjoined and restrained pending trial and determination of this action, from publishing, distributing, licensing, marketing or otherwise disseminating the book currently entitled *J.D. Salinger: A WRITING LIFE* or excerpts thereof, in its present form; and it is further

ORDERED, that plaintiff shall continue in full force and effect his present bond, posted herein at the time this Court issued its Temporary Restraining Order in the sum of $5,000, conditioned for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

Issued: New York, New York
Feb. 18, 1987

HON. PIERRE N. LEVAL
U.S.D.J.